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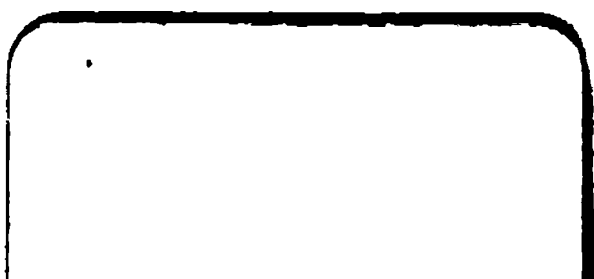
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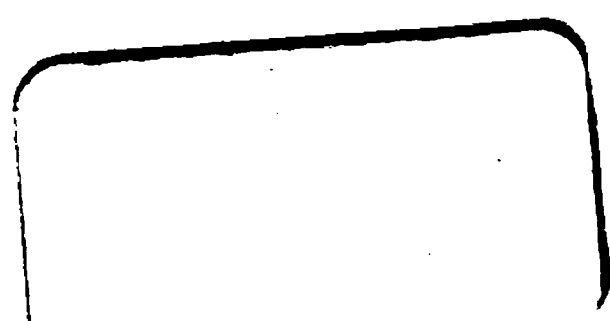
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REPORTS

OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

WESTERN DIVISION,
April Term, 1901;

EASTERN DIVISION,
September Term, 1901.

GEORGE W. PICKLE,
ATTORNEY-GENERAL AND REPORTER.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

WESTERN DIVISION.

JACKSON, APRIL TERM, 1901.

KNIGHTS OF PYTHIAS *v.* STEELE.

(*Jackson*. April 20, 1901.)

1 CHARGE OF COURT. *Erroneous as to preponderance of evidence.*

In civil cases a mere preponderance of evidence in favor of the party upon whom the burden of proof rests is sufficient to entitle him to recover, and an instruction to the jury is erroneous, as requiring more than a preponderance, which is in these words: "A witness is only valuable to the extent that his evidence establishes some material fact or circumstance which aids in making clear and plain to your minds some question involved in this litigation." (*Post*, pp. 4, 5.)

Cases cited: *Gage v. Railroad*, 88 Tenn., 724; *McBee v. Bowman*, 89 Tenn., 132.

 Knights of Pythias v. Steele.

2. SAME. *Same.*

An instruction to the jury, in an action on a life policy to which the defense of suicide is interposed, is erroneous, as requiring more than a preponderance of the evidence, which states that "the burden of proof is on the defendant to establish to the satisfaction of the jury, by a preponderance of the evidence," that the insured committed suicide. It is not essential, in a civil case, that facts shall be "established"—that is, "settled certainly," or "fixed permanently." Nor is it essential that the evidence shall "satisfy" the minds of the jury—that is, set their minds at rest and free them from doubt, suspense, and uncertainty. (*Post*, pp. 6-13.)

3. NEW TRIAL. *Granted for incompetency of juror, when.*

The fact that a juror falsely stated, on his *voir dire* examination, that he had not served on the regular panel within the last two years, and thereby deceived counsel and prevented his challenge for cause, is a sufficient ground for setting aside a verdict and granting a new trial, especially where this fact is fortified by such conduct of the jury, on and after the trial, as indicated that they were not fair and impartial. (*Post*, pp. 13-15.)

Constitution construed: Article I., Section 6.

Case cited: *Neely v. State*, 4 Bax., 180.

 FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. L. H. ESTES, J.

F. P. POSTON for Knights of Pythias.

GREER & GREER for Steele.

WILKES, J. This is a suit against the Endowment Rank of the Order of Knights of Pythias

Knights of Pythias v. Steele.

to recover \$3,000, the amount of a benefit certificate in the fourth class upon the life of J. K. Steele, payable to his wife as beneficiary.

The application contains the clauses usual in such certificates, to wit: that the assured would punctually pay all dues and assessments and be governed and controlled by all the rules, laws and regulations of the order governing the ranks then in force or that might afterwards be enacted, or submit to the penalty therein contained, and any violation of the conditions and requirements of the laws governing the rank should render the certificate and all claims under it void, and the order should not be liable for the sum named in the certificate nor any part of the same.

The order had, at the time this certificate matured, a by-law or regulation as follows:

"If the death of any member heretofore admitted shall result from suicide, whether voluntary or involuntary, or whether such member shall be sane or insane, or if such death shall be caused or superinduced by the use of liquors or narcotics or opiates, then the amount to be paid upon such member's certificate shall be a sum only in proportion to the whole amount as the matured expectancy is to the entire expectancy at the date of admission; the expectancy of life based upon the American Experience Table of Mortality in force at the time of death to govern."

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It is conceded that this by-law is binding upon the beneficiary under said certificate.

The order, by its plea, averred that Steele's death was brought about by himself by an act of self-destruction or suicide, or was caused or superinduced by the use of liquors, narcotics or opiates within the meaning and terms of the by-law, and it was therefore under obligation to pay no more than the *pro rata* provided in the by-law of \$780.12, and this it was willing, and offered, to pay.

There have been three trials of the case before juries. The first trial resulted in a verdict of \$3,000. The Court suggested a remittitur to \$780.12, and on that being declined set aside the verdict and awarded a new trial.

The second trial resulted in a verdict for the same amount, and upon it judgment was rendered, and, a new trial having been refused, an appeal was taken to this Court and the judgment of the Court below was reversed at the April Term, 1900, and a new trial awarded.

This reversal was upon an error in the charge of the Court. The third or present verdict was for \$3,000, and upon it judgment has been rendered and an appeal prayed.

It is said the trial Judge erred in his charge to the jury when he told them:

"A witness is only valuable to the extent that his evidence establishes some material fact or cir-

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cumstance which aids in making clear and plain to your minds some question involved in this litigation."

Criticism is made of several expressions used in this charge and that as a whole the rule is stated too rigorously. It is said that in civil cases a litigant cannot be required to establish any material fact or circumstance, but it is sufficient if the evidence preponderates in favor of or against such fact, and that evidence may be valuable which aids to make this preponderance, although the fact may not be made clear and plain; that it is not incumbent on a litigant in civil cases to make the questions involved in the litigation clear and plain, but it is sufficient if the evidence preponderates in favor of the view of either party, although it may not establish any material fact or circumstance and although the questions involved may not be made clear and plain.

In the case of *Gage v. Railroad*, 4 Pick., 724, it was said, criticizing and correcting the charge of the Court below: "It is sufficient in civil cases if, after weighing the evidence on both sides, a preponderance is the one way or the other. The burden is on the plaintiff to make out his case, and he is only required to do so by a preponderance, but when he has done so he is entitled to recover."

In *McBee v. Bowman*, 5 Pick., 132, there was

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a contest over a will, the defense being that the will was a forgery. The Court below, in speaking as to this defense said, among other things: "It should appear with reasonable certainty that such is the case." This Court in commenting on that expression said: "To our minds the whole instruction means, and was intended to mean, that to establish a charge of forgery, it was incumbent on McBee to show the fact by that degree of preponderance or weight of testimony necessary to produce conviction of its existence with reasonable certainty. The instruction is manifestly erroneous. Reasonable certainty implies the absence of reasonable doubt. Telling a jury that they must be convinced of a fact with reasonable certainty is almost, if not quite, the same as telling them they must be convinced of it beyond a reasonable doubt. In civil cases preponderance is all that is required."

The third and fifth assignments are in substance the same as the second above set out, that is, they question the quantum of evidence required by the Circuit Judge to establish the defense that the insured committed suicide.

The specific charges complained of are as follows:

"3. Such is the love of life that the law presumes no man will commit suicide or intentionally kill himself, therefore the burden of proof is on the defendant to establish to the satisfaction

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of the jury by a preponderance of the evidence that J. K. Steele did intentionally take a dose of morphine or other narcotic and that it produced death.

“5. If the facts and circumstances as proven in this case, establish the fact to the satisfaction of the jury that said Steele did use opiates and narcotics, but the same were not used with the intention and purpose of producing death, then the establishing of such facts would meet the requirement of the law.”

We think the criticism of these portions of the charge is in the main correct.

The meaning of the word “establish,” as applied to the quantum of evidence, is to settle certainly or fix permanently what was before uncertain, doubtful or disputed. 11 Am. Enc. of Law (2d Ed.), 353. It is a term much more appropriate for criminal than civil cases, but even in criminal cases the facts do not have to be established so as to settle them certainly and leave no ground for dispute, but only beyond a reasonable doubt.

In the case of *Eberhardt v. Sanger*, 51 Wisconsin, 79, the issue was to be proven, if at all, by circumstantial evidence. The Court said: “The use of the word ‘establish’ in the charge seems to have been specially unfortunate. The word ordinarily means to settle finally, to fix unalterably, and in this sense the instruction given would

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be equivalent to saying that the facts recited were not conclusive evidence of fraud. In this sense it was peculiarly inapplicable.

It was unnecessary for the plaintiff to furnish conclusive evidence, and yet from the instruction the jury might well infer that it was essential for him to do so. The question is, whether these instructions, given as they were without qualification, did not tend to mislead the jury.

We are clearly of opinion while the collateral facts and circumstances recited in each might not of themselves establish fraud, yet it is quite evident they tended more or less to prove fraud, and it seems to us that the instructions should have been differently worded, or that there should have been some qualification either as to each of said instructions or generally as to all." See, also, 11 Am. & Eng. Enc. of Law (2d Ed.), 357, note.

It is not necessary in a civil action that any fact should be "established," that is, "settled certainly" or "fixed permanently," which may have been uncertain, doubtful or disputed theretofore. It is not required that the evidence shall be clear and plain or that it shall satisfy any reasonable man. The word "satisfy" means "to free from doubt," "suspense," or "uncertainty," "to set the mind at rest."

Now, it is necessary that the jury should be satisfied that there is a preponderance one way or

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the other, but this does not mean that it must be satisfied of the truth of the fact itself.

Mr. Greenleaf, in his work on Evidence, section 2, volume I., says: "By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof which will ordinarily satisfy an unprejudiced mind beyond a reasonable doubt."

The law does not require that any theory or contention of either party in a civil suit shall be freed from doubt, suspense or uncertainty, that the evidence must set the minds of the jury at rest, that it must be clear and plain, that it must be established in the usual acceptation of that term, but merely that the contention shall be supported and made out by a preponderance of the testimony, although the jury may nevertheless have some doubt or uncertainty and their minds may not be at rest, and that the fact may not be certainly fixed. A jury may consider that a fact is shown by a preponderance of the testimony when it falls short of making it clear and plain or removing doubt from their minds, but the rule is if the evidence is of sufficient weight to preponderate in favor of any theory or contention, that in a civil case is sufficient. Now, the several charges in the case complained of clearly lay down the rule that the evidence in the case must be of such a character or so clear and

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plain as to satisfy any reasonable man, and remove doubt from the minds of the jury.

The true statement of the rule is that if the evidence preponderate in favor of any contention of the plaintiff or defendant, that contention may by the jury be considered as sufficiently sustained to rest a verdict upon, and it is not necessary that the evidence should go so far as to make said contention clear and plain or establish it in a sense to make it free from doubt or uncertainty or set the minds of the jury at rest and convince them absolutely of the truth of the contention. After all the evidence that can be produced is introduced, the jury may still be unsatisfied—not convinced, their minds may not be at rest, they may not be freed from doubt, uncertainty and suspense, but still the jury may recognize that there is a preponderance of evidence, and on that they may base their verdict.

The trial Judge modified the language contained in the fourth assignment by adding, after giving the rule as we think too strongly, as follows: “Whenever the defendant has produced evidence which preponderates in favor of the view that said Steele did take narcotics or opiates with the intention of producing death, and you find that same did produce death, then it has met the requirement of the law as applied to the cases of persons who unintentionally commit suicide, and

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in such case your verdict will be for the defendant."

This latter statement is correct law, but it is only used in connection with the improper language in the fourth assignment, and not with reference to the other expression complained of.

This feature of the charge is very important under the facts of the case. No one was present when the assured died. There is nothing to show how he came to his death but circumstances. These are regarded in contrary lights by several witnesses. There was no conclusive evidence how the death was caused—no theory that would be free from some doubt or admit of no different views or conclusions. The minds of the jury could probably not rest entirely at ease upon either theory advanced; at most they could only weigh the evidence and determine where the preponderance lay and give a verdict accordingly.

We are of opinion, therefore, that there is error in the charge of the Court as assigned, and for this the judgment must be reversed and the cause remanded for a new trial.

There is an assignment that there is no evidence to support the verdict, and as applied to the facts of this case it means that the defense of suicide is made out.

Now, under the rule applied in this Court, there is undoubtedly some evidence that death was not caused by suicide, but this Court cannot weigh

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the evidence and say that it preponderates in favor of or against this proposition. Nor, under the charge of the Court below, could the jury base their verdict upon a mere preponderance of the evidence. The jury may have believed that the preponderance was in favor of the theory of suicide, but unless they were satisfied of it and found it plain and clear and established to their satisfaction, they could not find for the defense set up under the charge as given. It is not sufficient answer to this to say that the rule applies to both sides alike. In a certain sense it does so apply, but in a practical sense it bears in each case upon the party upon whom the burden of proof rests, and in this case it rested on the defendant to prove the suicide. Now, this it should have been required only to show by a preponderance of evidence.

It is true that in the early part of his-charge the trial Judge said: "Under these pleadings the burden of proof is on the plaintiff to establish to the satisfaction of the jury by a preponderance of the evidence, every material point in her case," but while this instruction is approximately correct, though not literally so, in its use of the word "satisfaction" the charges complained of do not follow this instruction nor concur with it, but are a departure from it, and do not leave the jury to understand that it is only necessary to have

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a preponderance of evidence to base a verdict upon.

It is assigned as error that the Court below erroneously refused to grant a new trial on the grounds of incompetency and misconduct of the jury. It appears that three of the jurors who sat upon the case, to wit, Munroe, Felts and Flanagan, had served upon the jury in Shelby County within two years before they were called upon the jury in this case, and were therefore incompetent. It appears that the jury was placed in the box and tendered to the parties in a body. Counsel for the Order, when the jury was thus tendered, asked the question of them collectively if any one of them had served as a juror on a regular panel in any Court in Shelby County within the last two years, and each shook his head.

It appears also that when this jury was made up on the Monday preceding the trial, for service generally in the Court, two of them, Munroe and Flanagan, were examined separately and individually by the presiding Judge, and each answered that he had not served on any regular jury in the county of Shelby within the two years next preceding. The other juror, Felts, appears not to have been present and was not examined on that occasion, but it is reasonably certain from the record that he was examined when he was afterward chosen, though he states he was not.

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We are of the opinion that these jurors were not the good and lawful men to whom the parties were entitled as jurors under Article I., Section 6, of the Constitution. *Neely v. The State*, 4 Bax., 180. They were not competent to serve as jurors, and were subject to challenge. Shannon's Code, § 5090.

While it is not a good objection generally, after verdict, that a juror who sat on the case was incompetent *propter defectum*, and it does not matter whether the fact was known to the parties or not, yet this rule proceeds upon the idea that the juror might have been examined before being selected or the parties might have ascertained the fact and excluded such juror by challenge. But in this case the counsel for the company exercised reasonable precaution to ascertain if the jury or any one of them was incompetent by inquiring of the jurors themselves, and had the assurance of competency, from the presumption that the trial Judge examined them upon that point when they were placed on the regular jury, and the actual fact of a second examination by himself. The jurors explained that they were mistaken about the time when they served, and did not intend to state a falsehood or mislead. However this may have been, the fact of incompetency existed, and counsel for the company was misled and deceived, after taking proper precautions to ascertain the fact, and by the jurors

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themselves while either actually or virtually under oath, and it was not simply a case of want of knowledge of incompetency nor a waiver of incompetency, with or without knowledge of its existence, in which case the exception being *propter defectum*, must be considered as waived; but it is a case where the exception was reasonably made, or would have been made but for the incorrect or false statements of the jurors, which misled the defendant's counsel and influenced his action. It is true counsel might have examined the jury books of the Court, and such other Courts in Shelby County as had jurors, but this would have been an extraordinary precaution, which would have consumed time and delayed the Court, and he could not be required so to do.

The demeanor of some of the jury leads to the belief that they, or some of them, were anxious to sit upon the case, and their subsequent conduct, in drinking, after the verdict, with the brother of plaintiff, who was managing the case, makes it more than doubtful whether these jurors were such fair and impartial persons as the parties had a right to demand, and upon this ground, also, the judgment of the Court below must be reversed.

It is not necessary to pass upon the other assignments.

The judgment of the Court below is reversed, and the cause remanded, and appellee will pay costs of appeal.

Polk v. Gunther.

POLK v. GUNTHER.

(Jackson. April 20, 1901.)

1. **VENDOR'S LIEN.** *Enforcement of, against life tenant does not affect remainderman.*

The enforcement of a vendor's lien, to which the entire title is subject, by sale of land in a suit to which the life tenant alone is made a party, does not affect the interest of the remainderman. (*Post*, pp. 17-20.)

2. **SAME.** *Same.*

And, in such case, the remaindermen, whose interests were not sold, will not be required, as a condition to recovery of same after the expiration of the life estate, to account for any part of the purchase price that was appropriated to the extinguishment of the vendor's lien. (*Post*, p. 21.)

3. **ESTOPPEL.** *To set up title to land.*

The owner of land who actively induces its purchase as the property of another will be estopped to set up his title against such purchaser, although the owner may have acted in ignorance or forgetfulness of his own title. (*Post*, pp. 20, 21.)

4. **PARTITION.** *Improvements made by one tenant in common.*

When one tenant in common, at his own expense, puts improvements on the common property, and, afterwards, partition in kind is made, such improvements should be allotted to the share of the party making them, and without any charge for their value. (*Post*, pp. 21, 22.)

Cases cited: *Reeves v. Reeves*, 11 Heis., 669; *Estell v. University*, 12 Lea, 476; *Simpson v. Sparkman*, 12 Lea, 360; *Broyles v. Waddell*, 11 Heis., 32.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County. F. H. HEISKELL, Ch.

Polk v. Gunther.

FINLAY & FINLAY for Polk.

HANCOCK & POSTON for Gunther.

WILKES, J. This is a bill to have the rights of the parties declared in a tract of $4\frac{1}{2}$ acres of land lying in the suburbs of Memphis, and to have the same partitioned. The land originally belonged to Mary F. McNutt. She conveyed it in 1867 to Martha A. Polk and her son, James K. Polk, as tenants in common, reserving a lien for unpaid purchase money. By a provision in the deed the one-half interest of Martha A. Polk is conveyed to her as her sole and separate property for and during her natural life, and at her death the same is to descend to and vest in her children then living, and in the heirs of any who may be dead, such heirs taking the interest which their father or mother would have taken if living.

Mrs. Polk died April 13, 1899, leaving four children and four grandchildren, the latter being children of her son, Jno. R. Polk, who died before his mother.

These children and grandchildren claim the share which was deeded to their mother, upon the theory that the interest vested in them under the terms of the deed, at the time it was executed, had never been divested out of them by the proceedings hereinafter referred to.

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The purchase money not all having been paid by Martha A. Polk and her son, James K. Polk, the land was sold to enforce the vendor's lien, when Merriweather, who had in the meantime married Miss McNutt, the original vendor, became the purchaser at less than the balance of purchase money. It appears that in the decree confirming the sale, this deficit was by some sort of an agreement satisfied.

Mrs. Merriweather and her husband afterwards conveyed the lot in fee simple, but by a quit-claim conveyance, to Mrs. Martha A. Polk. This was in 1871.

On April 12, 1882, Mrs. Polk conveyed the entire tract by warranty deed to the defendant, Laura O. Gunther. She and her husband put improvements upon one of the lots and sold it to J. A. Taylor, who is in possession. Upon the hearing the Chancellor gave decree in favor of the complainant for the interest claimed by them, except H. C. Polk, whom he held estopped to claim any share by acts *in pais* in procuring his mother to make the sale and warranty deed to defendants.

He refused to require the successful complainants to pay their proportionate parts of the original purchase money satisfied by the foreclosure sale.

He released the lot and improvements sold to Taylor from all claims of the parties to this

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cause, but directed the value of the lot without improvements to be charged against the share of Mrs. Gunther in the partition, and taxed the costs one-fifth against H. C. Polk and four-fifths against Gunther and wife.

H. C. Polk appealed from so much of the decree as adjudged him estopped to claims his one-twelfth interest in the land, and failed to adjudge him the owner thereof and adjudged costs against him. The complainants in the original bill appealed from so much of the decree as adjudicated that Laura O. Gunther should not be charged with the improvements on the Taylor lot, and Gunther and wife from so much of the decree as gave any of the complainants any interest in the lot. All parties have assigned errors, and they will be disposed of in inverse order in which they are named.

We are of opinion that under the deed from Miss McNutt to Mrs. Polk and her son, Mrs. Polk took a life interest in one-half of the land as her separate estate, with remainder to such of her children as might be living at her death, and the descendants of such as might then be dead, the descendants taking the share the parents would have taken, if living.

It is not necessary to decide whether the remainder vested at the time the deed was made, or at the time when the life estate fell in—that is, it is not necessary to determine whether it

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was a vested or contingent remainder, for in either case it was necessary that the children (who were *in esse*) of Mrs. Polk at the time should be made defendants to the bill in order to sell the entire land, even though such sale may have been under judicial proceedings to collect the purchase money.

If they were not made parties, the only effect of the decree was to divest the title of such persons as were made parties, and the purchaser only obtained the share and interest of the persons who were made parties, and not those in remainder who were not made parties.

The only title, therefore, which the purchaser obtained under the foreclosure proceeding was the undivided half interest of J. K. Polk and the life estate of Mrs. Martha A. Polk in the other undivided half interest.

We are of opinion that, under the facts developed in this record, H. C. Polk is estopped to set up any claims to a share as against the defendants. He negotiated a sale of this property for his mother to the defendants, and in the negotiations represented to them that his mother owned the property, and had a good title to it, and would make them a good title. He caused the deed to be prepared conveying the property to them in fee, with covenant of warranty, and was active in consummating the trade with defendants upon his assurance and their belief based

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thereon that they were obtaining a good and perfect title.

It does not matter that he did not know as a matter of fact, and have it in his mind, that he was entitled, with his brothers and sisters, to a share in the land. He had constructive notice of the fact, and must be held to have waived all claim in favor of the parties misled by his assurances.

It is said that it was error not to charge complainants with a proportionate part of the original purchase money paid off by the sale under the foreclosure proceedings.

This contention would probably be correct if the interest of the remaindermen in the half interest of their mother had been sold; but under the view we take of the case, only the interest of the mother as life tenant was sold, together with J. K. Polk's half interest, and this was what the purchaser paid for, and he paid for nothing else, and secured or received nothing else, and the interests of the remaindermen were not affected by the proceeding.

There was no error in directing that in the partition of the lot the improvements upon the Taylor lot should not be estimated or charged up to defendants, but the lot should be.

When one tenant in common, at his own expense, puts improvements on the common property, and afterwards partition in kind is made, such

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improvements should be allotted to the share of the party making them, and without any charge for their value. *Reeves v. Reeves*, 11 Heis., 669; *Estell v. University*, 12 Lea. 476; *Simpson v. Sparkman*, 12 Lea, 360; *Broyles v. Waddell*, 11 Heis., 32-42; *Nelson v. Clay*, 23 Am. Dec., 387.

The case of *Broyles v. Waddell* is strictly in point.

We are of opinion the decree of the Chancellor is correct, and it is affirmed. The costs of appeal will be equally divided between the complainants and defendants. The costs of the Court below will remain as adjudged by the Chancellor.

Earp v. Edgington.

EARP v. EDGINGTON.

(*Jackson*. April 27, 1901.)

1. EVIDENCE. *Incompetent as cause for new trial.*

Where the jury has been permitted to hear and consider incompetent evidence without exception, new trial will not be granted on this account alone. (*Post*, pp. 29, 30.)

Cases cited: *Ins. Co. v. Scales*, 101 Tenn., 640; *Perey v. Perey*, 94 Tenn., 331.

2. SAME. *Same.*

But if the Court instructs the jury erroneously and prejudicially as to the consideration of such evidence, that constitutes good cause for new trial. (*Post*, pp. 30, 31.)

3. WILLS. *Admissibility of subsequent declarations of testator.*

Testator's declarations, made subsequently to the making of his will, are not competent to prove that the will was the result of undue influence, or of fraud or force, excited by or on behalf of a few beneficiaries thereunder. (*Post*, pp. 31-34.)

4. SAME. *Poverty and afflictions of contestants not competent.*

It is not competent to prove, on the trial of an issue of *deviseavit vel non*, the poverty and afflictions of the contestants. (*Post*, pp. 34, 35.)

5. SAME. *Request on subject of undue influence erroneously refused.*

On the trial of a contest for undue influence, fraud, and force, of a wife's will bequeathing her entire estate to her husband, it is reversible error for the court, after giving a bewildering, if not misleading, charge, to refuse to give this special request on behalf of contestee, to wit: That if the jury found that the husband "was loyal to his wife in her misfortunes, and during the entire period of their married life gave his time and attention to the promotion of her interests and the improvement of her estate under her direction, then they might look to these facts as showing a motive for the making

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of the will, and if they further believed from the evidence that it was made because of gratitude and affection for him, and without duress, fraud or undue influence practiced by him on the testatrix, then they should find for the will." (*Post*, pp. 35-37.)

6. SAME. *Ratification of will obtained through undue influence.*

Although a will may have been made originally as the result of undue influence, fraud or force, still it is valid if the testator, with full knowledge of the facts, and after the removal of all improper influences, freely ratifies and intentionally leaves it as her last will and testament. (*Post*, pp. 37, 38.)

7. CHARGE OF COURT. *Request as to weight of proof of admissions.*

A request for an instruction that the jury may consider and base their verdict upon parol evidence of admissions of a party, is not improperly refused where it does not contain the usual caution to the jury in considering parol evidence of admissions or declarations. (*Post*, pp. 38-40.)

8. SAME. *Same.*

A request for instruction that jury shall consider a party's admissions shown by parol evidence as "strong evidence" of an adverse fact, is erroneous and properly refused. (*Post*, p. 40.)

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

PIERSON & EWING and WRIGHT & WRIGHT for Earp.

EDGINGTON & EDGINGTON for Edgington.

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BEARD, J. This case involves an issue of *devisavit vel non* as to the will of the late Mary J. Smith.

The alleged testatrix died on February 19, 1897, and soon thereafter the will was probated in common form, and her surviving husband, Jasper N. Smith, qualified as executor. This will was dated May 14, 1886, and by its terms all of the estate, both real and personal, was given absolutely to her husband. In the month of May, 1899, Jasper N. Smith disappeared under circumstances which led to the universal belief that he had been murdered, and thereafter the nieces of Mrs. Smith, residents of the States of Missouri and Arkansas, joining with their husbands, having first secured the appointment of Jesse Edgington as the special administrator of the will of Mary J. Smith, instituted the present proceeding for the purpose of contesting the will.

There have been two trials of this case in the Court below, the first resulting in a verdict against the will, and the last, a new trial having been granted, terminated in a verdict for the will. The trial Judge approving this last verdict, entered judgment accordingly. Bills of exceptions covering both trials were preserved by the contestants, and the case is submitted upon errors assigned to the action of the Circuit Judge in granting a new trial in the first instance, and in refusing it in the second.

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In the year 1871, being then a widow, Mrs. Smith married one. Moore, who, in the year 1873, either committed suicide or was assassinated. In 1878 she intermarried with Jasper N. Smith. At that time she was possessed of an estate which is shown to have been worth about \$6,000, but which by judicious management, great economy, and continued labor on the part of both husband and wife, had been increased at the time of her death to possibly \$60,000. Mrs. Smith had a brother, Geo. W. Paine, who died in 1885 childless, and she had one sister, Mrs. Emily Jackson, who resided at the time of the latter's death, in the State of Kansas. Mrs. Jackson was the mother of the female contestants in this case.

In 1881 fierce litigation broke out between Mrs. Smith and her brother George, with regard to certain real estate in Memphis, of which Mrs. Smith held the legal title, and in which Paine claimed a large equity. In the progress of this litigation Paine gave a deposition in which he stated that his sister was the assassin of her former husband, Moore. Out of this grew an indictment against Mrs. Smith and her incarceration. The civil suit involving the land terminated in her favor, and in the trial for murder she was subsequently acquitted. These proceedings produced very vindictive feelings on the part of Mrs. Smith, not only toward her brother, who had furnished

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the basis of the prosecution, but also for her sister and family, whom she believed to have been, if nothing more, at least indifferent to her in her great trouble.

On the other hand, her husband was her loyal supporter and constant attendant during this trying ordeal. So in 1881, while in the county jail, she had Mr. Leopold Lehman, then and now a leading attorney of the Memphis bar, to prepare for her a will, in which she gave all of her property of every description to her husband. This will was deposited in the custody of Mr. Patterson, a former employe of Smith, and a prominent citizen of Memphis. In some way Mrs. Smith seems to have concluded that this will was lost, so in 1886 she had Mr. Lehman to prepare the will in controversy, in which, as in that of 1881, all of her estate was given to her husband. This will was deposited with her attorney, and was kept by him in his safe. Of the existence of this last will Mr. Smith evidently had no knowledge until after the death of his wife when both wills came to light, and the one of 1886 was probated in common form.

In the trial of the issue of *devisavit vel non* the material grounds of assault, as stated in the brief of counsel for contestants, were, first, "that the will of Mrs. Smith was procured by the fraud and the undue influence of Jasper N. Smith,"

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and, second, "that Mary J. Smith by a later will revoked the one offered for probate."

In granting the motion to set aside the first verdict the Circuit Judge, in answer to the request of the contestants, reduced to writing his reasons for this action, and the same by proper order is made a part of the record. In the course of this opinion, and as stating the final conclusion of the Court, the trial Judge uses the following language:

"Several witnesses have testified about conversations had with Mrs. M. J. Smith, in which she said that she had made another will. No one of them claimed to know any more than this about it.

"Does this evidence come up to and meet the requirements of the Code and the Supreme Court decision, where it holds that a last will may be established upon satisfactory proof that it was duly made and not revoked? The Court holds it does not, and, therefore, that it erred in allowing the jury to consider such evidence without any limitation on the question as to whether or not another will had been made by Mrs. M. J. Smith. For this error, and others which the Court need not now recite, the motion for a new trial in this case is granted."

To understand the pertinency of these observations, it is proper to state that the purpose of the contestants was to show that from the time

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of Mrs. Smith's incarceration her husband industriously plied her with the suggestion that her sister, Mrs. Emily Jackson, and her family, were in sympathy with her brother, Geo. W. Paine, at least to such an extent that they were indifferent to her fate, and that under the influence of the impression thus fraudulently superinduced, that this was so, when in fact it was untrue, the will of 1881 was made; that after her release from prison, the husband, with the fraudulent purpose of continuing this impression upon the mind of his wife, intercepted letters from Mrs. Jackson and her daughters to Mrs. Smith, and by reiterated denunciation of these relatives exercised such undue influence upon her as that in 1886 the latter, still believing in the indifference or hostility of these parties, made her second will, and that she entertained this belief until she made a short visit to Mrs. Jackson and her family in November, 1896, when discovering the fraud practiced upon her, she returned to Memphis and made a third will providing for these contestants, and that this will was seized by Jasper, immediately after the death of his wife, and destroyed.

To make out these grounds of attack, several witnesses were introduced by the contestants, who testified to conversations at various times with Mrs. Smith, all of which were long subsequent to the execution of the will in question, and only a

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short time before her death, which it may be conceded tended to sustain these contentions.

It is to the admission of this testimony that the trial Judge refers in the paragraphs set out above, and for his error in failing properly to limit it, he in part granted the new trial.

It is true this evidence went to the jury without valid objection, and was thereby made competent (*Ins. Co. v. Scales*, 101 Tenn., 640), and in the absence of a special request upon the part of the proponents to have a proper limitation put upon it, if the trial Judge had left it to work out its own effect on the jury, then the proponents could not complain. *Perry v. Perry*, 94 Tenn., 331.

The contestants now insist that he did place legal restrictions on this testimony, and that he was in error in assuming otherwise, and having thus mistakenly granted a new trial, inasmuch as there was some evidence to support the verdict of the jury, that they are entitled to a reversal of his action, and a judgment of this Court on the verdict.

But did he properly limit this testimony? In his charge to the jury the trial Judge, after calling attention to the wide range the testimony had taken, added: "I charge you specially that the witnesses you have heard in regard to the condition of mind under which she labored, and the statements which she may have made, were only

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competent for you to consider to aid you in ascertaining and determining what the real condition of her mind was, and whether or not she was imposed on by Jasper N. Smith by any artifice or deception of his, or was by him forced or induced to make a will which she would not have made but for such deception, force, or undue influence in the making of said will," etc.

In giving this wide scope to this testimony the trial Judge was in error. For it is settled in this State that subsequent declarations of the testator are not admissible to show undue influence. *Perry v. Perry*, supra.

We think he was equally in error in saying to the jury that these declarations could be considered by them in determining whether the testatrix was imposed on by Jasper N. Smith by any artifice or deception, or was under the influence or force exercised by him over her in the making of this will.

The admissibility and effect of the declarations of a testator, made both before and subsequent to the making of a will, have been the subject of frequent discussion, resulting in very divergent conclusions, in the various Courts. It is not our purpose to enter at length into that discussion in this opinion.

We have examined many of the cases, and among them an opinion recently delivered by the Supreme Court of the United States, involving a

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paper propounded as the will of Judge Advocate Jo Holt, which, with great ability and research, goes over the whole ground of controversy. This opinion was handed down by Associate Justice Peckham on March 25, 1901, and is reported in the advance sheet of the opinions of that Court. The case referred to is that of *Throckmorton v. Holt*.

Among the defenses made to the instrument propounded as the will of the late Judge Holt, were, first, that it was forged; and, second, that it had been revoked. As to the first, Justice Peckham puts this question: "Can the contestants prove by unsworn oral declarations, and by letters of the deceased, facts from which an inference is sought to be drawn that the disposition of the property as made in the paper is improbable, and that the paper was therefore a forgery?"

The Court held they could not. In the course of the opinion it is said: "The declarations are purely hearsay, being merely unsworn declarations, and when no part of the *res gestae* are not within any of the recognized exceptions admitting evidence of that kind. Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental condition, yet they are generally stated in cases where the mental capacity of the deceased is the subject of the inquiry, and in these cases his declarations on

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that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations as indicative of the state of his affections are no more admissible than would be his unsworn declarations as to any other fact. There is another reason why no exception should be made in favor of such evidence upon which to build a presumption or inference of forgery, and that is the inherent weakness and danger of the evidence itself. No inference is generally more uncertain or unreliable than that which is sought to be drawn upon the question of the genuineness of a will from the alleged condition of a testator's mind towards relatives or others as evidenced by his declarations. It is every day experience that declarations of that nature are to the last degree unreliable as a basis for an inference as to probable testamentary disposition of property. Those who thought by reason of such declarations that they would certainly be remembered in the will of the testator are so frequently disappointed, and, that too, in cases where there is not the remotest suspicion of forgery, that it would seem exceedingly unsafe to permit a jury to draw an inference based upon such evidence relative to the genuine character of the instrument propounded as a will. We are therefore of the opinion that the Court below

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erred in admitting this evidence upon the issue "of forgery."

Upon the issue of revocation, after an exhaustive review of the authorities bearing thereon, the Court sums up as follows: "There must be an act and an intention in order to revoke. Neither can be inferred from evidence of declarations of a testator apart from the act, and with no proof that the testator ever performed an act of a revocatory nature. Unless a part of the *res gestae*, we see no reason for the admission of these declarations any more than upon the issue of forgery."

We are satisfied with the soundness of reasoning and the strength of the conclusions announced in the opinion, not only as to the inherent weakness, but the incapacity, at least of subsequent declarations of the testator, to show the facts of forgery or revocation.

The reasons that make them incompetent to show these facts would render them incompetent to show that the husband in this case induced his wife, by artifice or deception, or compelled her by force, to execute the will in his favor. So the trial Judge committed affirmative error in saying to the jury that they might consider this evidence in determining the existence or nonexistence of these facts.

The trial Judge committed error also in permitting the witness, Earp, and Mrs. Clark, over

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the objection of contestees, to testify at great length and with much of detail as to the generally impoverished condition of all the contestants, and of the comparative blindness of one of them, an unmarried daughter of Mrs. Emily Jackson. This testimony was incompetent, and its only effect could be unduly to excite the sympathy of the jury for these poor kinspeople of the testatrix as against the heirs of Jasper Smith, aliens in blood to Mrs. Smith, the testatrix.

The charge of the Court in this case was very long, dealing with possibly every phase which a contest over a will is likely to assume. Confined to the issues involved, it would have been difficult for an average jury to follow it as a guide in their deliberations over a verdict. The case was one which required the charge, if it was to serve its proper purpose, to be as free from redundancy and superfluous matter as possible. Notwithstanding this necessity, several pages are devoted to the subject of insane delusion, and a hypothetical case is put to the jury, and they were told that should they find that Mrs. Smith was the victim of such delusion when her will was made in 1886, then they should find against it.

There is nothing in the record to warrant this charge. There is no suggestion in the evidence that she was ever subject to insane delusions. On the contrary, she is shown to have been a

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woman of strong character, great intelligence, dominating her husband and those about her.

While this of itself would not be reversible error, yet we do think, in view of what has already been said as to the length of the charge, that it was possibly calculated to mislead, and if not, at least to bewilder the jury, and therefore may well be embraced under the general terms, "others," which in part induced the Circuit Judge to set aside the verdict and grant a new trial.

There was further error in the trial Judge in declining to submit to the jury a special request submitted by the contestees, in which he was asked to say that if they found Smith was loyal to his wife in her misfortunes, and during the entire period of their married life gave his time and attention to the promotion of her interests and the improvement of her estate under her direction, then they might look to these facts as showing a motive for the making of her will, and if they further believed from the evidence that it was made because of gratitude to and affection for him, and without duress, fraud, or undue influence practiced by him on the testatrix, then they should find for the will.

This request clearly and briefly stated the theory of the contestees. It was abundantly warranted by the great weight of testimony in the case, and we think would have relieved the jury of

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much of difficulty growing out of the mass of evidence offered in their deliberations, and aided them in arriving at a satisfactory verdict.

Considering the whole case we are satisfied that there were enough errors in the record to make it the duty of the trial Judge to set aside this unwarranted verdict, and the assignment of error on his action in that regard is overruled.

We come now to the second trial and the assignments of error upon the action of the Court below in regard thereto.

1. It is insisted the trial Judge was in error in saying to the jury, in substance, that if they found from the evidence that if Mrs. Smith made her will in 1886 under the belief engendered by the husband that Mrs. Jackson and her daughters had been either indifferent or hostile to her in her troubles, and that upon a visit made to them in the year 1896 she discovered them to possess feelings of affection for her, and thereafter she had no prejudice against them, and that if they further found that she lived in Memphis for some time after her return from this visit, and knew this will was in the possession of her attorney, and went to his office to inquire as to its safety, and made no effort to cancel or destroy it or to make any other will, but permitted it to remain, intending it to be her last will and testament, notwithstanding she had full knowledge that her husband had deceived her as

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to the feelings of her family toward her, then their verdict should be for the will.

There was no error in this clause of the charge. Even if it were true that this will had been made as the result of deception practiced by the husband upon her, yet this did not place it beyond the power of the testatrix to ratify it, and if she did so after obtaining knowledge of the deception, and died with the intention that it should be her last will and testament, then, as a matter of law, it should be established.

On the subject of ratification, see Pritchard on Wills, Secs. 124, 150; 1 Red. on Wills, 514; *Floyd v. Floyd*, 3 Strob., 44 (S. C., 49 Am. Dec., 626).

2. Assignments of error Nos. 2 and 3 are upon the action of the Court in declining to grant two special requests of the contestants, as follows:

“The statements and admissions of Jasper N. Smith, made after the death of his wife, if found by you from the evidence, are competent to show the destruction or suppression by him of a will made by Mary J. Smith after her visit to her relatives, and should be so considered by you.

“If you find that the beneficiary, Jasper N. Smith, admitted, after the death of Mary J. Smith, that said Mary J. Smith had made a later and different will from the one of 1886 offered for

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probate, and that he had suppressed or destroyed the same, then you will find against the will."

These requests were directed to the testimony of one Miller, a witness for contestants, who, upon his own confession, had met Jasper Smith but three times in his life, and then upon chance occasions. At each of these meetings both were drinking, and Smith was more or less under the influence of the liquor. Upon one of these occasions he testified Smith stated to him that he had substituted an older for a later will of his wife.

Verbal admissions deliberately made may afford proof of the most satisfactory character. But evidence of casual statements or admissions by a party, made in a casual conversation with another, is regarded as affording weak support to that which they are adduced to prove. It is universally agreed that they are of little weight, and unless corroborated, are to be received with caution. *Wittick v. Keifer*, 31 Ala., 199; *Railroad Co. v. Kerler*, 88 Ga., 39; *Becker v. Crow*, 7 Bush (Ky.), 198; *Prater v. Frazier*, 11 Ark., 249; *Haven v. Mask*, 67 Wis., 493.

In the case at bar, after a careful reading of the testimony of this witness, we are satisfied that it is subject to great suspicion. So that if the trial Judge had called the attention of the jury to these alleged admissions, it would have been his duty to have admonished them of

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their inherent probative weakness. The special requests were properly declined, failing as they did to embody any limitation or qualification as to such evidence.

4. The special request the refusal to give which is made the basis of the fourth assignment of error, is more objectionable than the two just disposed of. There the trial Judge is asked to say that if they believed these admissions, then they might consider them as "strong evidence" that Mrs. Smith had revoked the will in controversy. Other objections out of the way, it is apparent this request was properly rejected as the weight of testimony introduced is for the jury and not for the Court to determine.

Finally, we have examined the portions of the charge of the trial Judge covered by the fifth, sixth, and seventh assignments of error, and do not find them open to the criticism made upon them. In view of the length of this opinion we are content to say these assignments are overruled.

From an inspection of this record we are satisfied the merits of the case have been reached, and that the plaintiffs in error have failed to point out any error in the conduct of the last trial. It follows that the judgment of the lower Court is affirmed.

Taylor v. Lumber Co.

TAYLOR v. LUMBER CO.

107	41
110	200

(Jackson. May 4, 1901.)

1. MECHANICS' LIEN. *Subcontractor's Rights.*

A subcontractor is not entitled to personal judgment against the owner of property for the value of labor or materials furnished to a contractor and put into its improvement. There is no privity between the subcontractor and the owner of the property in such case. (*Post*, p. 42.)

2. SAME. *Same.*

A subcontractor, not being entitled to judgment against the owner of the property for the value of materials or labor furnished to a contractor and put into its improvement, cannot enforce his mechanics' lien for same against the property by execution, but alone by attachment. The statutory provision for enforcement of mechanics' liens by execution as well as by attachment, though general in terms, is restrained by necessary construction to contractors' liens, who are in privity with the owner of the property and entitled to personal judgment against him, upon which execution may issue. (*Post*, pp. 42-45.)

Act construed : Acts 1873, Ch. 19.

Code construed : §§ 3531, 3540, 3543, (S.); §§ 2739, 2740, 2746, 2747 (M. & V.); §§ 1981, 1986-7, (T. & S.).

Cases cited : Barnes v. Thompson, 2 Swan, 313.

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. J. S. GALLOWAY, J.

Taylor v. Lumber Co.

S. J. SHEPHERD for Taylor.

C. R. WHITE for Lumber Co.

BEARD, J. This suit was instituted in a Justice of the Peace Court by an ordinary summons, and without attachment, by a subcontractor to enforce a furnisher's lien for material used by the principal contractor in the construction of a house upon the lot of a married woman. There was a judgment in the Court below against the married woman and her husband for the amount claimed by the furnisher, with an order for the issuance of a *venditioni exponas* for the sale of the lots to satisfy the alleged lien.

It is clear that the trial Judge was in error in rendering a personal judgment against the defendants below, as there was no pretense of privity between them and the plaintiff. They neither bought the lumber furnished, nor is it claimed that they assumed the debt of the principal contractor to whom it was furnished.

In fact the record shows that they had settled in full with him, and whatever loss may occur to the plaintiff below was by reason of his default.

We think there was also error in the judgment as to the property. Chapter 37 of the Acts of 1825 first created the mechanics' lien, and Chapter 118 of the Acts of 1846 perfected "the lien

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of mechanics," and extended its benefit to "journeymen and others." Up to the passage of this latter Act there was great doubt with the Courts and among the lawyers of the State as to the "proper form and mode of proceeding" for the enforcement of this lien. *Barnes v. Thompson*, 2 Swan, 313.

The third section of this Act of 1846, however, provided as follows: "That the lien herein given may be enforced by attachment at law or in equity."

Under this statute all parties claiming the benefit of this lien, in order to secure it, were forced to sue out an attachment against the property sought to be subjected to it.

These several statutes were brought into the Code of 1858, and were embodied in §§ 1981, 1986, and 1987 thereof. The failure, therefore, to have issued an attachment in the present case is fatal to this proceeding, unless there is some other statutory provision which preserves it. It is claimed that such provision is found in Chapter 19 of the Acts of 1873, which provides as follows: "That § 1987 of the Code be so amended as to read as follows, to wit: This lien shall be enforced by attachment either in law or equity or by judgment and execution at law, to be levied upon the property on which the lien is."

While the original section afforded a remedy to the contractor and subcontractor alike, we can-

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not believe that the amendment was intended by the Legislature to cover the case of a subcontractor, who stands in no privity with the owner. On the contrary, we think its only purpose was to give a choice of remedies to the original contractor.

The terms used, it seems to us, forbid any other construction. They are technical terms, and have a fixed legal meaning.

The word "judgment," when used in actions *in personam*, implies two parties, one, the plaintiff, in whose favor, and the other, the defendant, against whom the judgment may be pronounced. As said in *Kramer v. Robinson*, 9 Iowa, 114, "at law the judgment is yea or nay, for one party and against the other."

But there can be no judgment in this sense, in such a case as the present, where no contractual relations exist between the parties. Again, the statute provides for an "execution at law to be levied on the property on which the lien is."

It would be an anomalous writ, an execution issuing against no one as defendant. It is to be noted that the statute is specific that the writ issuing is to be an "execution at law, not a *venditioni exponas*."

The latter is distinctive in character, and will always be awarded where the leinor is proceeding by attachment.

It is a writ commanding the officer to sell the

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goods and chattels or real property, already brought by a levy of some prior writ within the custody of the law. Vol. 11, Am. & Eng. Enc. of the Law, p. 609.

The execution, however, provided in this amenuatory act is one "to be levied," and rests upon no preceding levy. It is, in other words, the writ of *feri facias*, which is equally distinctive.

To hold otherwise would be to sink well established differences, producing confusion in practice, where no practical good is to be accomplished. For holding that the subcontractor's lien is to be enforced only by attachment, leaves him the amplest remedy.

The judgment is reversed, and the suit is dismissed.

Greer & McGowan v. Chickasaw Land Co.

GREER & MCGOWAN v. CHICKASAW LAND CO.

(*Jackson*. May 4, 1901.)

1. CERTIORARI. *Application for, when made.*

Application for certiorari, as a substitute for an appeal, to review a Justice's judgment must be made at or before the first regular term of the Circuit Court held in the county after rendition of the justice's judgment or sufficient cause averred for the delay.

Cases cited: Trigg v. Boyce, 4 Hay., 100; Perkins v. Hadley, 4 Hay., 143; Love v. Hall, 3 Yer., 408; Tipton v. Anderson, 8 Yer., 222; Newman v. Rogers, 9 Hum., 121; Johnson v. Deberry, 10 Hum., 440; McMurry v. Milan, 2 Swan., 177; Brinkley v. Burney, 5 Cold., 103; Mason v. Hammons, 7 Cold., 133; Lanier v. Williams, 1 Head, 442; Mason v. Westmoreland, 1 Head, 557; Nance v. Hicks, 1 Head., 625; Gillam v. Looney, 1 Heis., 319; Copeland v. Cox, 5 Heis., 174; King v. Williams, 7 Heis., 305.

2. SAME. *Excuse for delay in making application for, insufficient, when.*

An application for certiorari, to review a Justice's judgment, will be dismissed, on motion, where the petition shows that applicant had delayed over two and one-half years, and until bill had been filed to enforce the judgment, to file his petition, in which no excuse is averred for the last year's delay.

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. J. S. GALLOWAY, J.

Greer & McGowan v. Chickasaw Land Co.

GREER & DURHAM for Greer & McGowan.

WILKERSON & McGEHEE for Chickasaw Land Co.

WILKES, J. This is a petition for writs of certiorari and supersedeas. On the motion of the land company the Court below dismissed the petition because of the long delay in bringing it, and the petitioners have appealed, and insist that upon the facts disclosed in the petition the Circuit Judge erred in dismissing it.

It is admitted that the petition on its face states merit, and shows the judgment to be unjust, but it is not conceded that on the trial the judgment will be shown to be unjust. The facts necessary to be referred to, as stated in the petition, are that petitioners bought from Napoleon Hill the privilege of cutting some timber from his lands near Memphis. Through no fault of the plaintiffs, but rather through the fault of the defendant's agent in incorrectly pointing out the lines, the petitioner crossed over Mr. Hill's line and cut \$35 worth of timber on the lands of the Chickasaw Land Company, which adjoins the lands of Mr. Hill. On this fact becoming known to petitioners, they sought Mr. Hill, who was the president of the land company, and paid him \$35 for the timber which they had cut on the lands of the company, and Mr. Hill agreed to pay the amount over to the land

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company in full of all claims by the company against petitioners.

For some reason he failed to do this, and the land company brought suit in 1897 for \$499 for the timber cut.

Petitioners attended the Justice's Court at the time set for hearing, when the case was continued. In the meantime petitioner saw Mr. Hill, and he assured them that no judgment would be taken, and that the matter should be settled under the original agreement.

Petitioners, supposing the matter settled, paid no further attention to it, but the company nevertheless took judgment by default for \$499 and costs. This was September 17, 1897.

Petitioners did not know of this judgment until March, 1899, and hence did not appeal, but on hearing of it made a proposition to the company to compromise and adjust the matter. The negotiations extended over several months, when, as the petition says, the petitioners not having heard from the company, supposed the matter was dropped, or that the company was waiting till later to make a settlement.

On April 12, 1900, the company, by bill in chancery, sought to enforce the judgment of the Justice of the Peace by subjecting certain equitable interests of John R. Greer in real estate in Shelby County.

Thereupon the petition was filed and as here-

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tofore stated was, on motion, dismissed. The petitioner seeks to set aside the judgment of the Justice of the Peace and have a new trial. If we grant, which is doubtful, that the petitioner states a reasonable excuse for delay up to the time when efforts to compromise failed, which must have been prior to September term, 1899, then were three or four terms of Court allowed to intervene before the petition was filed, and it was not then filed until proceedings in chancery were begun to execute the judgment, on April 12, 1900, the petition being filed April 25, 1900.

We do not think that this is the exercise of proper diligence. If we grant that petitioners were in no fault up to the time the negotiations for compromise failed, still it was incumbent on petitioners having a judgment standing against them to have pressed the compromise to a conclusion and not to have presumed that the judgment was abandoned.

We are of opinion the judgment of the Circuit Judge is correct, and it is affirmed with costs.

OPINION ON PETITION TO REHEAR.

WILKES, J. A very earnest petition to rehear is filed, in which it is said that the merits of the case appear so strongly that this Court should overlook the delay and allow a hearing of this case upon its merits; and the petitioners were justified or excused for the delay by the fact that negotiations

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were pending and it was incumbent on the land company to notify petitioners before abandoning the negotiations for settlement. It is said that the manifest injustice of the judgment appears from the fact that it was taken for \$499, when it had been previously conceded by the president of the company that the timber taken did not exceed \$35 in value, and he had been paid that sum in full of the claims of the land company. This feature of the injustice of the judgment from the statement in the petition has already been adverted to, and need not be repeated except to say that the facts stated in the petition may not be found to be true on the hearing. As already said, the petition on its face presents a strong case of merits, but we think the reasons and excuses for the delay, at least after the failure of the negotiations for settlement, are not, under the uniform practice of this Court, sufficient.

The general rule is that a certiorari, when sought to be used as a substitute for an appeal, must be applied for before or at the first regular term of the Circuit Court after the rendition of the Justice's judgment, unless a sufficient cause for delay be stated in the petition. *Trigg v. Boyce*, 4 Hay., 100; *Perkins v. Hadley*, 4 Hay., 143; *Love v. Hall*, 3 Yer., 408; *Tipton v. Anderson*, 8 Yer., 222; *Newman v. Rogers*, 9 Hum., 121; *Johnson v. Deberry*, 10 Hum., 440; *McMurry v. Milan*, 2 Swan, 177; *Brinkley v. Burney*, 5

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Cold., 103; *Mason v. Hammons*, 7 Cold., 133; *Lanier v. Williams*, 1 Head, 442; *Mason v. Westmoreland*, 1 Head, 557; *Nance v. Hicks*, 1 Head, 625; *Gillam v. Looney*, 1 Heis., 319; *Copeland v. Cox*, 5 Heis., 174; *King v. Williams*, 7 Heis., 305.

In *Perkins v. Hadley*, 4 Haywood, 143, it was held that an application for certiorari made more than one year after judgment, would be refused, although it was manifest, under subsequent rulings of the Court that the judgment was wrong, the course of decisions having changed in the meanwhile.

In *Tipton v. Anderson*, 8 Yer., 222, it was held that a petition would not be sustained which was sworn out after three terms of the revising Court, no matter how strong a case might be made by the petition.

In *Newman v. Rogers*, 9 Hum., 121, judgment was rendered 29th August, 1846; Newman attempted to appeal. This appeal was dismissed at the October term, 1846. Petition for certiorari was filed 4th June, 1847, or about eight months after the appeal was dismissed. It was said in an amended petition that the petitioner was absent from the county, and when he returned he entered into negotiations with the attorney of the opposing party for a compromise, but, owing to no fault of his, he did not get an answer to his proposition until after the September term of the

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Court. The Court held it was not sufficient excuse for delay and that it was incumbent on petitioner to take immediate steps to remove the case into Court.

In *McMurry v. Milan*, 2 Swan, 177, judgment was obtained 18th of February, 1852. On the 17th of March one of the defendants' suspicions was aroused and he ascertained that the notes of his son-in-law, upon which the judgment was taken, were forgeries, and on the 9th of April he filed his petition for writs of certiorari and supersedeas. The Court said it was a strong case of merit, and relief would be granted if it could be done without a violation of settled rules of law, and in a case of such hardship the rules might be extended but for the mischievous consequences of such a precedent and the importance of adhering to settled principles.

In *Smith v. Brown*, 1 Heis., 320, note, it was held that a petition would not be entertained more than five years after judgment, although defendant did not know of the judgment, he conceding, however, that he was served with process.

In *Gillam v. Looney*, 1 Heis., 319, judgment was rendered February 24, 1866. Execution issued in June, 1868. and the petitioner alleged that this was the first reliable knowledge he had of the judgment. The Court held this language equivocal and that the delay was too great, and dismissed the petition.

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In *McDowell v. Kellar*, 1 Heis., 449, the certiorari was applied for two years after judgment and several months after the final decision in a case whose determination the parties were awaiting, and the Court held the petition should be dismissed.

In the present case judgment was rendered September 17, 1897, execution was issued in March, 1899. Four terms of the Court had intervened after the negotiations had apparently failed or ceased to be prosecuted, and after a bill had been filed to subject the equitable interest of one of the defendants in a tract of land.

We cannot sustain a petition after such delay and upon such excuse without overturning the uniform rule or holding of our Court, and the petition to rehear must be dismissed.

Nott v. Fitzgibbon.

NOTT v. FITZGIBBON.

*(Jackson. May 5, 1901.)*1. WILL. *Copy of will construed.*

"I hereby will my home place of seventy (70) acres, and seventy acres on the west and adjoining, and seventy acres still west, to my wife, Hanna Fitzgibbon, and my son, James Fitzgibbon, jointly for life. In case my son, James Fitzgibbon, dies without issue, or my wife should die, I hereby will and bequeath the homestead and the next seventy acres to Mrs. Margaret Nott and her four daughters, for life, and will remainder to their heirs. I hereby will and bequeath seventy acres, more or less, lying west of the home place and the seventy acres before mentioned, to Thomas Clifton and his children, for their lives, with remainder to their heirs, after the death of my wife and son, James Fitzgibbon." (*Post*, pp. 55, 56.)

2. SAME. *Construction of same.*

The Court holds upon a proper construction of said will: (1) That testator's widow and son, James, take an estate for their joint lives, and during the life of the survivor of them, in the three tracts of land; (2) that testator's son, James, having survived the widow and having heirs born to him, takes the homestead tract and the seventy acres adjoining it on the west, in contingent fee, determinable upon his dying "without issue;" he takes only the life estate in the other seventy acres in any event; (3) that Margaret Nott and her daughters take, under the devise to them, only in the event that the son, James, dies without issue; (4) that Thomas Clifton and his children take the remainder in the seventy acres devised to them absolutely, and free from the condition contained in the devise to Margaret Nott and her daughters. (*Post*, pp. 55-65.)

Cases cited: *Petty v. Morse*, 5 Sneed, 126; *Owen v. Hancock*, 1 Head, 562; *Cowan, McClung & Co. v. Wells*, 5 Lea, 682; *Battle v. House*, 4 Lea, 202; *Alston v. Davis*, 2 Head, 265.

3. SAME. *Construction of separate provisions.*

There must be connection by grammatical construction, direct words of reference, or by the expression of some common pur-

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pose, between distinct bequests or devises in a will, to justify the drawing in aid the special terms of one bequest to construe another. Independent provisions, not so connected, must be separately construed, even though there may be room for conjecture that the testator had the same intention as to all. (*Post*, p. 63.)

Cases cited: *Simpson v. Smith*, 1 Sneed, 394; *Randolph v. Wendel*, 4 Sneed, 647; *Wood v. Polk*, 12 Heis., 220; *Kay v. Connor*, 8 Hum., 624.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, Ch.

EDGINGTON & EDGINGTON for Nott.

BOYLE & BOYLE, WILLIAM TAYLOR, and RANDOLPH & RANDOLPH for Fitzgibbon.

BEARD, J. The bill in this cause was filed for a construction of the second paragraph of the will of the late Edward Fitzgibbon, which is in the words following, to wit:

“2. I hereby will my home place of seventy (70) acres, and seventy acres on the west and adjoining, and seventy acres still west, to my wife, Honora Fitzgibbon, and my son, James Fitzgibbon, jointly for life.

“In case my son, James Fitzgibbon, died without issue, or my wife should die, I hereby will and bequeath the homestead and the next seventy acres

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to Mrs. Margaret Nott and her four daughters for life, and with remainder to their heirs.

“I hereby will and bequeath the seventy (70) acres, more or less, lying west of the home place, and the seventy acres before mentioned, to Thomas Clifton and his children for their lives, with remainder to their heirs, after the death of my wife and son, James Fitzgibbon.”

The property which was thus devised was a tract of land lying near the city of Memphis, which consisted, in the aggregate, of two hundred and ten acres, but which, by a survey made at the instance of the testator, had been subdivided into three tracts, in the form of parallelograms, of seventy acres each. The tract on the east was called by him indiscriminately the “homestead” or “home place,” as on it was located his residence and appurtenances. On the west of that lay one of the tracts in question, and still farther west, but adjoining, however, the last, was the other seventy-acre lot.

The Chancellor, having found as a fact that Honora Fitzgibbon was dead, construed the paragraph set out as follows :

“(1) That it was the intention of the testator, Edward Fitzgibbon, to give his son, James Fitzgibbon, in case he survived his mother, Honora Fitzgibbon, a life estate in the 210 acres composed of the three seventy-acre tracts.

“(2) That the testator intended that if James

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Fitzgibbon died leaving issue surviving him, such issue should take the fee in said 210 acres.

“(3) That the testator also intended that in case the said James Fitzgibbon should die without issue surviving him, that Mrs. Margaret Nott and her four daughters should take a life estate in the seventy acres known as the homestead, and the next seventy acres west of said homestead, with remainder to their heirs in fee.

“(4) That the testator intended that Thomas W. Clifton and his children should take a life estate in the seventy acres west of the two seventy-acre tracts mentioned in three (being the westernmost seventy acres of the 210-acre tract), with remainder to their heirs in fee, provided that James Fitzgibbon should die without issue surviving him.”

In part we agree and in part disagree with this construction. We agree with the Chancellor in holding that the testator devised to his wife, Honora, and to his son, an estate for their joint lives, and during the life of the survivor, the three tracts above described, but we do not concur with him in his conclusion “that the testator intended that if James Fitzgibbon died leaving issue surviving him, such issue would take the fee in said two hundred and ten acres.”

This conclusion can be based alone on the ground that an estate by implication is created in the issue of James; for it is apparent that

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there are no express words in the will creating an estate in any portion of the tract in such issue. In the case of *Machell v. Weiding*, 8 Sim., 4, "the testator gave real and personal estate to his wife for life, and after her death to her son James for life, but if his son should die without issue, not having any children, then his estate to be sold and the money to be divided among his other children."

In construing this clause, with the view of determining the character of the estate which the son of the testator took, Sir L. Shadwill, V. C., observed "that it was perfectly manifest that the testator did not intend the estate to go over so long as any issue of the first taker were in existence; and I consider it," he said, "to be a settled point that, whether an estate be given in fee or for life, or generally, without any particular limit as to duration, if it be followed by a devise over in case of the devisee dying without issue, the devisee will take an estate tail." In discussing this and other cases, Mr. Jarman, in his very learned and exhaustive work on Wills, in his second volume, star page 139 (page 556), says: "It is to be observed that where the person on whose general failure of issue a devise is expressly made expectant, is the heir at law of the testator, he becomes by the application of the rule under consideration tenant in tail by implication in precisely the same manner as if there

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had been a prior devise to him and his heirs in the will."

In the case just referred to and in the rule thus announced by the author, if they are controlling, we have the key to the construction of the clause now being considered. For in this we have the testator devising to "his heirs at law" for the term of his life (he having survived his mother, who is now dead), with a limitation over if "he die without issue"—which under section 3675 of the Shannon's Code, means issue "living at the time of his death or born to him within ten months thereafter." As no intention otherwise is "expressly and plainly declared in the will creating it," this estate tail, under section 3673 of the (Shannon's) Code, would be converted into an estate in fee in the son, James, and his issue would take, not under the will, but as his heirs.

This estate in fee, however, would be determinable or conditional upon his dying without issue, in which event, and only in such event, will the limitation over, in favor of Mrs. Nott and her four daughters for life, with remainder to their heirs take effect.

But we have a line of cases in this State settling this question without resorting to the rule laid down by Mr. Jarman, and yet which bring about the same result. In *Petty v. Moore*, 5 Sneed, 126, the testator devised and bequeathed his

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real and personal estate to his wife for life with remainder over to his eleven children.

By a codicil to his will, among other provisions, was the following: "I do will and declare, if any of my eleven children shall die without an heir of their body, that all of the property that shall ever descend to them from me shall return and be equally divided among the remainder of my heirs that shall be living." One of these children died after the decease of the testator, but before the life estate ended, leaving children, and the question was, Did his share of the testator's estate vest in his children, under the clause of the codicil, or "did it pass in the ordinary course of descent to his representatives, real and personal."

The insistence for the children was that they took under the codicil "by implication of law," but it was held otherwise. This Court said: "It is clear that by the previous provisions in the body of the will the eleven children of the testator took, severally, a permanent interest in the remainder, and it is equally clear that by the codicil each one of the children named therein was vested with an immediate, absolute interest, subject to the possibility of its being divested in a future contingency; that is, upon the death of either without child."

This rule was afterwards, in *Owen v. Hancock*, 1 Head, 562, applied to the taker of a

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life estate. The provision in the will then construed was as follows: "I give to my daughter, Mary Cooper, a negro girl, Celia, during her lifetime, and if she should die without any heirs of her body, the said negro girl and her increase to return to my estate and be equally divided among the rest of my children." The Court said: "Here is a disposition of slaves to his daughter for life, and no express disposition over except in one event, that she should die without "heirs of her body," and in that event to go to his, the testator's, other children. This contingency did not happen, for she died in 1853, leaving three children. It cannot then return to his estate, and the question is, where does it go, when the event upon which it was to go over made the will, however, impossible?

"In the will of Amistead Moore there was a clause very similar to this, which we construed at the last term (5 Sneed, 127), as we now do this. Perhaps the only difference is, that then the estate given was general, dependent upon the contingency of dying without heirs of the body, and here it was for life in terms. Can this make any difference in the construction? We think not; and so are the authorities. So the life estate, expressly given, was enlarged into a fee, upon the birth of a child." The authority of these cases is in no way disturbed by *Turner v. Ivie*, 5 Heis., 222, and they are referred to approv-

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ingly in the later cases of *Cowan, McClung & Co. v. Wells*, 5 Lea, 682, and the rule therein announced may well be regarded as one of property in this State.

So that, the record disclosing that James, the son, is married and has had issue born to him, under this rule the estate for life devised to him in the homestead of seventy acres and the tract of seventy acres immediately west thereof, has been enlarged into a fee, determinable, however, upon his dying "without issue" (*Petty v. Moore*, supra, and *Battle v. House*, 4 Lea, 202, and *Alston v. Davis*, 2 Head, 265), in which event the limitation over will take effect.

Nor do we agree with the Chancellor in his construction of the last clause of this paragraph, in which provision is made for Thomas Clifton and his children for life, with remainder over.

It will be observed that there is an essential difference between the clause in which the testator creates the limitation over to Mrs. Nott and her daughters and the heirs of the latter, and the one we are now called upon to construe. In the first the limitations take effect only in the event that "James Fitzgibbon die without issue, or [which is to read 'and'] my wife shall "after the death of my wife and son, James Fitzgibbon." It is only by the addition of the words "provided that James shall die without issue," that the construction of the Chancellor can

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be sustained. For this we think there is no authority. The two clauses, while embraced in one paragraph, are independent of each other, as much so as if they constituted separate items located in different parts of the will. The later clause makes provision for new parties, and is altogether free from ambiguity.

It does not require a reference to the earlier clause for aid in interpretation, and to make such reference with a view to interpretation, is to run counter to what we conceive to be the plainly expressed intention of the testator. This would be to make a will for him.

In addition we think to do this would be in the face of a well established rule of construction. Mr. Pritchard, in his very excellent work on Wills, at section 391, says: "There must be connection by grammatical construction, direct words of reference or by the expression of some common purpose, between distinct bequests or devises in a will, to justify the drawing in aid the special terms of one bequest to construe another. Independent provisions, not so connected, must be separately construed, even though there may be room for conjecture that the testator had the same intention as to all." This text is supported by *Simpson v. Smith*, 1 Sneed, 394; *Randolph v. Wendel*, 4 Sneed, 647; *Wood v. Polk*, 12 Heis., 220; *Kay v. Connor*, 8 Hum., 624.

Mr. Jarman thus formulates the rule:

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“That several independent devises, not gramatically connected or united by the expression of a common purpose, must be construed separately, and without relation to each other, although it may be conjectured, from similarity of relationship, or other circumstances, that the testator had the same intention in regard to both. There must be an apparent design to connect them.” Rule 22, 3 Jarman on Wills, star page 343.

So we hold that under this paragraph of the clause a vested remainder for life was created in Thomas Clifton and his children, with remainder to their heirs, which will ripen into an estate in possession immediately on the death of James Fitzgibbon, whether with or without issue.

We further hold that this devise embraces alone the most western of these three seventy-acre tracts. We disagree with the construction of the counsel for Clifton and his children, that it was the purpose of the testator to devise to them the two tracts lying west of the home tract. It is not essential to its true construction to interpolate words.

The phraseology, we think, with a sufficient distinctness indicates that these parties should take the “seventy acres lying west of the home place,” and also west of the seventy acres immediately adjoining it on the west. This saves all repugnancy and meets what we conceive to be the evident intention and purpose of the testator.

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A decree will be entered here embodying this construction of the second clause of the will. The cross bill of Thomas Clifton is dismissed at his cost. All other costs in the cause will be divided between the complainants and the defendants.

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BANK v. MEMPHIS.

(*Jackson*. May 5, 1901.)

1. TAXATION. *Back assessment.*

The back assessment feature of the General Assessment Act of 1897 does not authorize back assessment, for 1897 and preceding years, of property—*e. g.*; the capital stock of banks whose shares were exempt, which was not subject to original assessment under the laws applicable to said years. (*Post*, pp. 69–73.)

Act construed: Acts 1897, Ch. 1.

Case cited: *Bank v. Memphis*, 101 Tenn., 154.

2. SAME. *Suit for taxes paid under protest maintainable, when.*

A taxpayer who has paid taxes under protest can maintain an action to recover same, although he has not applied to the Board of Equalization for relief, when the assessment is void, as having been made without authority of law. (*Post*, p. 72.)

Case cited: *Ward v. Alsup*, 100 Tenn., 746.

3. DECREE. *Construction of.*

The meaning of a decree must be ascertained from its face; and its terms cannot, in the absence of pleadings impeaching it, be varied or altered by parol proof. (*Post*, pp. 73–76.)

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKELI, Ch.

Bank v. Memphis.

COOPER & WADDELL and CARROLL, MCKELLAR & BULLINGTON for Bank.

JNO. H. WATKINS for Memphis.

WILKES, J. This bill is by the bank to recover taxes which it has paid to the city for the year 1897.

There was a demurrer by the city, which was overruled with permission to rely on the same defenses by way of answer. In its answer the city set up that the bank was liable for taxes for 1897; that it had voluntarily paid them in a suit which had been previously brought to collect them, and hence it could not now recover them back from the city.

Proof was taken, and on final hearing the Chancellor gave the bank judgment against the city for \$7,172.36 and costs, and the city has appealed and assigned errors.

It appears that the Trustee of Shelby County, who is by law tax-collector and treasurer of the city of Memphis, about the middle of January, 1899, assessed certain taxes against the capital stock of the bank upon the idea of omitted property and picked up taxes, including the taxes for 1897. This was done after due notice to the attorney of the bank. The taxes not having been paid, a bill was filed in chancery at Memphis on January 28, 1899, by the State, county, and city against the bank, to recover the State,

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county, and municipal taxes assessed on the bank's capital stock by the Trustee.

The bank answered that its capital stock was exempt from taxation by reason of a clause in its charter, and contended that there was no legislative authority for its taxation.

No proof was taken, but on February 10, 1899, a decree was entered which struck out the assessments for 1896, but the assessments for city taxes for 1897 was permitted to stand, the decree reciting as follows:

"The Court being advised in the premises, and the complainants consenting thereto, it is adjudged and decreed that the assessments so made by the Trustee (1896, 1897, 1898) be canceled, vacated, and set aside, and for naught held except so far as the same is, or may be, the basis for city taxes for the year 1897, and for which purpose the assesment is reduced to the sum of \$217,000." The assessment had been made by the Trustee at \$600,000.

There was a last clause to this decree, in the following words: "It being admitted by the complainants that the Trustee, John H. Alsup, has in his hands a distress warrant for the collection of the city taxes for the year 1897, and threatens to seize the property of the defendant for the payment thereof, it is hereby expressly provided that the payment of said taxes provided by this decree to be made for said year, shall be con-

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sidered and held as made under protest and duress of goods, and defendant shall have the benefit thereof, if it shall elect to sue to recover back said taxes."

The contention of the bank in this case is that the Trustee had no power to make the assessment, and it is therefore void, and not merely irregular or informal; that the bank was not subject to assessment for 1897; that the taxes were paid under duress, and hence the bank may recover them back; that the decree rendered in the former suit is not *res adjudicata* of the right to the taxes, and not a bar to the present action.

In the case of *Bank v. Memphis*, reported in 17 Pickle, 154, this Court held that an assessment made by the Board of Equalization of Shelby County for the year 1896 upon the capital stock of this bank, under the Act of 1895, was invalid for want of legislative authorization. It appears that under the cross bills filed in that case the county and city claimed taxes upon the bank for 1896, 1897, and their cross bills on the hearing were dismissed.

The liability of the bank for a tax upon its capital stock was, however, determined and announced. Afterwards, in April, 1897, the Legislature in a general law provided for the assessment and taxation of such banks, being Chapter 1 of the Acts of 1897, which was approved April 30, 1897.

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Section 16 of that Act provides as follows: "*Be it further enacted*, That this Act shall not be so construed, and shall not so operate, as to exonerate and release from taxation any company or corporation whose charter exempts stock and shares thereof from taxation; but it is hereby enacted that in all cases where such stock is exempted, such company or corporation shall be assessed in such a way as may be lawful; and in all cases in which, by the terms or legal effect of the charter, the shares of the stock in any corporation are wholly or partially exempt from taxation, or in which a rate of taxation on the shares of the stock is fixed and prescribed, and declared to be in lieu of all taxes for State, county, and municipal purposes, shall be assessed and levied at a rate uniform with the rate levied upon other taxable property, upon the capital stock of said corporation, the value of which capital stock shall be fixed and returned by the Assessor as being equal to the aggregate market value of all the shares of stock in said corporation, including the net surplus; *Provided, however*, That where the State has provided, in the charter of any such corporation or company, that it shall pay a stated per cent. on each share of stock subscribed annually to the State, which shall be in lieu of all other taxes, it shall be entitled annually to a credit therefor upon its assessment of its capital stock as hereinafter provided."

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The warrant of law under which the Trustee assumed to act, and to assess the capital stock of the appellee for the year 1896, is to be found in Section 26 of Chapter 1 of the Acts of 1897. That section is as follows:

"Be it further enacted, That should it at any time after the assessments have been made, come to the knowledge of the Chairman or Judge of the County Court, the Clerk of said Court, County Trustee, Sheriff, or any other officer or person of any county of this State, that any person, company or firm, or corporation in said county has not been assessed as contemplated by the provisions of this Act, or has been assessed or has paid taxes of an inadequate amount, it shall be the duty of said Chairman, or Judge, Clerk, Trustee, Sheriff, or other officer or person, on motion of District Attorney or Clerk or Revenue Agent for State, to cite said person, company, firm, or corporation, their agent, representative, or attorney to appear before the Trustee or County Court Clerk, in case of merchants' taxes, is hereby authorized and empowered to make proper assessments against such persons, firm, or corporation; and should it appear that said person, firm, company, or corporation did in any manner connive at or purposely evade said assessment, or did knowingly permit an inadequate assessment to be made, said Trustee or County Court Clerk, in case of merchants' taxes, shall

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correct said assessment, and in case of *ad valorem* taxes add thereto a penalty of 25 per cent., and cause the whole to be entered upon the tax books for collection."

The contention is, that no assessment could be made under this Act until after its passage, and no retroactive effect could be given to any assessment that might be made under it, and that no assessment was made for 1896 or 1897 at the time prescribed by law, and there being no assessment for 1896, there was no basis for an assessment by the County Trustee for 1897, for city taxes under its charter and the general laws relating to it.

It is said for the city that the remedy of the bank was to apply to the Board of Equalizers and have the assessments set aside. This undoubtedly would be true if the assessment was merely irregular or informal, but not if it was void for want of power to make it. *Ward v. Alsup*, 100 Tenn., 746.

It is also said that the assessment may be sustained upon the theory of a picked up assessment, but the whole system of picked up assessments rests upon the idea that property subject to assessment escaped such assessment at the date when it should have been made. In other words, that there was property and a law for its assessment, and it escaped the assessment by being overlooked or undervalued.

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We are of the opinion that the assessment of the bank for the city taxes for 1897 was invalid, and not authorized by any legislative provision.

Under the charter and the laws relating to municipal taxes in the city of Memphis, the taxes for 1897 were fixed by the assessments made of property for the year 1896, and upon the property as it then existed, and was then subject to taxation. In other words, the city taxes for 1897 were fixed by the assessment for 1896, and so with each year; they were fixed by the assessment for the preceding year.

Now, when the assessment was made for 1896, there was no legislative authority to assess the capital stock of the bank, and hence it could not then be assessed under the peculiar status of the tax provision of the charter and laws relating to city taxes. While the legislative authority to tax the capital stock of the bank was conferred April 30, 1897, there had been no assessments and no authority therefor for the previous year upon which the assessment for 1897 could be based, and this being so, it was not liable to be assessed by the County Trustee as omitted or picked up property.

The question remains, Is the bank precluded by its payment to the city under the decree referred to from recovering it back from the city?

If it was paid willingly, though irregularly,

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and without obligation, it may not be recovered back, but if under protest and duress, it may, if it was illegally assessed and collected.

The decree under which this payment was made is peculiar, in that it contains a provision, in substance, that the payment is made under protest and duress of goods, and that defendant shall have the benefit thereof if he shall elect to sue to recover back said taxes.

In addition to the recitals heretofore set out, the decree further provides as follows:

“And it further appearing to the Court that the city of Memphis claims of the defendant taxes on its capital stock for the year 1897, at the valuation of \$217,000, and the bank, by its answer claims that there was no law under which the city of Memphis could claim the aforesaid taxes of it, and that it was exempt from the payment of the said taxes, as well by its charter exemption as by the decision of the Supreme Court of Tennessee in the case of *Union & Planters' Bank v. The City of Memphis*, it is now and here agreed that the said taxes, with penalties, commissions, and attorney's fees, amounting to \$6,464.-50, may be paid to the said John Alsup, Trustee, under protest, upon the valuation of \$217,000, that valuation being fixed and agreed upon as being the same valuation which was fixed by the Board of Equalization as hereinbefore set forth, and that the said Union & Planters' Bank shall

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be at liberty, if it so desires, to sue for the aforesaid sum of \$6,464.50, and set up its right to recover the same in such proceeding if any "it shall desire to bring."

Considerable proof is taken by the attorneys representing the city and bank of the circumstances under which this decree was drawn, and what was intended by its peculiar provisions, and the testimony is not reconcilable except upon the idea that some provisions in the decree were overlooked and were not intended to be agreed to, especially so much of the decree as recites that the tax was paid under duress and seizure of goods, and that the bank might without prejudice sue to recover it back.

We are of opinion that the recitals in the decree as to the facts upon which it was based, and the rights reserved to the parties, must, as between the city and bank, be considered as conclusive, and there being no effort to set aside the decree for fraud or mistake, and really no allegation of either, the recitals and terms of the decree cannot be contradicted or varied by parol proof.

Nor are the provisions of the decree so repugnant *inter sese* that they cannot stand together, and the former part of the decree cannot be held as a final adjudication of the rights of the city to collect the taxes without regard to

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the reservations contained in the latter part of the decree.

It is evident that the decree was a compromise, and virtually a consent decree, and that the recovery of the amount by the city was conceded upon the condition that it might be treated as paid under duress and seizure, and that the bank might, if it saw proper, rely upon that feature in the event it should see proper to sue to recover the taxes back again. Indeed, it appears that one of the main objects of the bank was that there should be a concession, and no question but that the taxes were paid under protest and duress.

We are of opinion that the decree cannot, under the recitals in it and the circumstances shown to exist, be considered as a final adjudication of the right of the city to collect the tax.

This being so, and being of the opinion the assessment for the taxes for 1897 by the County Trustee was not authorized or warranted by law, we think there is no error in the decree of the Court below, and it is affirmed with costs.

Erck, Adm'r., v. Erck.

ERCK, Adm'r., v. ERCK.

(Jackson. May 11, 1901.)

1. JUDICIAL SALE. *Purchaser not released, when.*

A purchaser at judicial sale of lands to pay a decedent's debts, cannot avoid his purchase on the ground that incompetent evidence was heard on the reference as to assets and liabilities of the estate, or that other lands could have been sold more advantageously to the parties in interest, where these parties acquiesce and make no such objections. (*Post*, pp. 80-82.)

2. EVIDENCE. *Original files admissible, when.*

In a proceeding in a Probate Court to sell lands to pay debts of a decedent, the original files of that Court, including depositions taken, relating to the earlier stages of the administration, are competent evidence to be considered by the Clerk in executing the order of reference as to assets and liabilities of the estate, especially when there is no objection at the time, or at any time, by the parties to the cause. (*Post*, pp. 80, 81.)

Case cited: *Curd v. Bonner*, 4 Cold., 632.

3. ADMINISTRATION. *Sale of land to pay debts.*

Where it is essential to sell some of the lands belonging to an estate for the payment of debts, and it appears that the real estate consists of an undivided half interest in a valuable store, sufficient, of itself, to pay all the debts, and of other unimproved property insufficient, of itself, for that purpose, it is clearly advisable and proper to sell the undivided interest and reserve the unimproved property. (*Post*, pp. 81, 82.)

4. COURTS. *Jurisdiction of Probate Court of Shelby County defined.*

The Probate Court of Shelby County has undoubted jurisdiction

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to decree sale of lands for payment of debts of a decedent.
(*Post*, p. 82.)

Case cited and approved: *Connell v. Walker*, 6 Lea, 709.

FROM SHELBY.

Appeal from Probate Court of Shelby County.
J. S. GALLOWAY, J.

WARINNER & WARINNER for Erck, Adm'r.

S. A. PERSON and F. P. POSTON for Erck *et al.*

WILKES, J. This is a bill by the administratrix of Frank Erck to sell a sufficiency of his real estate to pay debts.

It was filed in the Probate Court of Shelby County, where the real estate all lies, and where the administration is being conducted. There were five separate pieces or parcels of the real estate, two of which were set apart to the widow as dower and homestead by said Probate Court. Of the remaining parcels two were vacant lots, and the other an undivided one-fourth interest in a storehouse on Front Street, in the city of Memphis. The bill which contains the allegations usual in such cases was filed against the children and heirs of the intestate, and their guardian, and against her creditors and the owners in common

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of the other interest in the storehouse. The latter parties filed answers and demanded proof of all material matters, and so with the guardian; *pro confesso* was taken against the creditors.

An order of reference was made to report the assets of the estate and its debts, and whether the personal assets had been exhausted in the payment of debts, also what real property belonged to the estate, and whether it would be necessary to sell it all or any part of it to pay debts, and if the latter, what portion could be sold with the least injury to the personal representatives and heirs.

What is called an insolvency proceeding had already been had in the Probate Court, to which the heirs and the creditors named were parties, and in that proceeding the depositions of the administratrix and the guardian were taken in regard to the debts and personal assets of the estate, from which it appeared that there was only \$6.50 of personal estate and about \$1,635.50 of debts, not including costs and charges, which would make a total of about \$1,800.

This record was referred to and used as evidence on the reference. The testimony of real estate brokers was also taken under the reference, to show the location and value of the real estate left after assigning dower and homestead.

From this testimony it appeared that the real estate was unimproved, except the one-fourth in-

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terest in the storehouse, and that the real estate outside of the undivided interest was not of value sufficient to satisfy the debts, and that the undivided interest was worth \$7,500, and that it was to the interest of the heirs and persons interested in the estate to sell this undivided interest and retain the vacant lots, and it was also recommended that the surplus from the sale be applied to improving the vacant lots.

The parties owning the remaining undivided interest in the property excepted to the report. No exception was filed by the guardian of the minors, nor was any exception filed by the creditors. The exceptions were overruled, and report confirmed, and the sale of the undivided interest was directed, and it was sold for \$7,750. Chas. M. Erck, one of the tenants in common, owning one-fourth of the same property, became the purchaser.

The purchaser then filed a petition to set aside the sale to himself upon the grounds hereafter stated. This petition was dismissed, and the sale was confirmed, and Erck, the purchaser, has alone appealed and assigned errors.

It is said the Court erred in looking to the insolvency proceedings to determine whether the land should be sold, and the contention is that the record in that case was not competent, but evidence *de novo* should have been taken to establish such facts.

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We think there was no error in this. All the parties interested in the land and its sale were parties to that proceeding. The owners of the other interests in the storehouse were not necessary parties to that proceeding nor in the present case are they interested in the question of the amount of the debts or the sale of the real property of the estate to pay them.

So far as the facts shown by this record extend, those parties were not concerned or interested, and the previous steps taken in the administration of the estate, and upon the suggestion of insolvency, were entirely competent and proper to be used in the present proceeding, as they are all but steps in a proceeding to sell the land and administer the estate. *Curd & Wife v. Bonner et al.*, 4 Cold., 632.

The second assignment is to the report of the Clerk that the undivided interest in the storehouse and lot should be sold instead of the vacant lot.

It is said it is not judicious to sell undivided interests in realty when there is property belonging in its entirety to the estate, and that bidders are not so apt to bid its value for undivided interests as when they are buying the property in its entirety. There are no facts stated to sustain this assignment, but it appears to be an expression of opinion on the part of the counsel. There is no allegation that the price brought was not full

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value, and, as a matter of fact, it was greater than the valuation put on it by expert real estate brokers by some \$250 or more. Moreover, it appears that by the estimates the other real estate was not sufficient to pay the debts, and this interest would, in all probability, have to be sold even if the remaining vacant lots were sold.

In addition the tenants in common or any one of them could at pleasure force a sale of the house and lot for purposes of partition. All of these facts show the advisability and necessity for selling this undivided interest in the storehouse.

There can be no doubt of the jurisdiction of the Probate Court of Shelby County to make this sale for the purposes for which it was made. *Connell v. Walker*, 6 Lea, 709.

It will be noted that the only person appealing and now complaining is the purchaser. We are of opinion that under the proceedings he obtained a good and perfect title and that none of the exceptions taken by him are well made, and the decree of the Court below is affirmed with costs.

Williamson v. Tunis.

WILLIAMSON v. TUNIS.

(Jackson. May 11, 1901.)

WILLS. *Gives transmissible interest, when.*

Under a devise of lands to testator's daughter, and, upon her death without issue, to her surviving brothers and sisters, or their issue, the daughter takes a vested and transmissible interest, subject to the contingency of dying without issue, and her issue take, not under the will, by inheritance from her.

Cases cited and approved: *Petty v. Moore*, 5 Sneed, 128; *Owen v. Hancock*, 1 Head, 563; *Alston v. Davis*, 2 Head, 266; *Cowan, McClung & Co. v. Wells*, 5 Lea, 684.

Cited and distinguished: *Springfield v. Jackson*, 11 Lea, 348; *Turner v. Ivie*, 5 Heis., 222.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
M. B. TREZEVANT, Sp. Ch.

R. P. CARY for Williamson.

J. B. HEISKELL for Tunis.

WILKES, J. In the shape this cause comes before this Court it is a bill to have the rights of complainant declared in a tract of land containing four acres, and to have the same partitioned

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and to have construed the will of B. B. DeGraffinreid. Complainant's right depends upon the construction of the will of B. B. DeGraffinreid. This will was made April 4, 1846, with a codicil dated 14th September, 1855, and disposed of a large amount of land, slaves and personal property.

The testator left a son, Henry E., who died intestate and without issue, a daughter, Elizabeth Springfield, who died leaving one son, Baker C. Springfield, who is still alive, but has now no interest in the controversy, a daughter, Agnes I. Fleece, who died intestate and without issue, and a daughter, Sarah B. Green, who died intestate September 28th, 1900, leaving defendant, J. N. Green, as her only living child, and complainant, Ada F. Williamson, as her grandchild, the daughter of a deceased child, and a grandson, Josiah Evans, who died intestate after his grandmother, leaving no children.

Complainant can only recover upon the right of her grandmother, Sarah B. Green, under the terms of the will of her father, B. B. DeGraffinreid, and she claims one-eighth of the property. Defendants, except J. N. Green, claim under a conveyance from Baker C. Springfield, Sarah B. Green and J. N. Green, and they are in possession.

The Chancellor held that Mrs. Sarah B. Green took an absolute estate in her share in this land,

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and that passed by her deed to Tunis, the ancestor of defendants, and from this portion of the decree the complainant appealed.

He also held that complainant, Ada, took equally with her uncle, J. N. Green, in all the other property of the estate devised to Mrs. Green except the land described in the bill, and from this part of the decree J. N. Green appears to have appealed, but has assigned no errors.

It is assigned as error for complainant that the Court incorrectly held that Sarah B. Green took an absolute estate, and not for life only, with remainder to her children and their descendants.

The provisions of the will which bear upon the title and interest of Mrs. Green are long and complicated, the property being settled upon and vested in trustees, but the language upon which the controversy turns is as follows:

“Upon the decease of either of my said daughters, Sarah and Agnes, or grandson, Josiah, or all, without leaving living child or children or descendants of such, then the portion allowed for such child or children or grandchildren so dying without leaving child or living descendants of such, to go in equal proportion to the survivors,” or, put in shorter language, the limitation to Mrs. Green is to her, and upon her death without issue, then to her surviving brothers and sisters.

The contention on complainant's part is that

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the proper construction of such limitation is that in the event there is issue as in the case of Mrs. Green, such issue take a remainder under the will, while for the defendants the contention is that in the event there is issue the estate of the first taker, Mrs. Green, became absolute. In other words the estate was vested in Mrs. Green subject only to be defeated by her dying without issue.

This will has heretofore been partially construed in the case of *Springfield v. Jackson*, 11 Lea, 348, the exact question in that case being the power of Blount Springfield to sell the land given to his wife.

It was said in that case that the title of Mrs. Springfield upon her death vested in her son, Baker C., by the terms of the will of DeGraffinreid.

But the provision under which Mrs. Springfield held her title is not the same as that vesting title in Mrs. Green, but as to Mrs. Springfield, it is provided in the third section of the will that her share on her death should go to her child or children or their descendants, and on failure of such to revert to the estate, while in the devise to Mrs. Green there is no provision that the property should go to her children or their descendants, but simply that if she died without issue then her share is to go to her brothers and sisters.

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In other words, as to Mrs. Springfield's share there is an express limitation to her children and their descendants, while in the case of Mrs. Green there is no such provision. For the same reason and on the same ground this case is distinguished from *Turner v. Ivie*, 5 Heis., 222.

The consequence is that as to Mrs. Green's share it is absolute under the terms of the will, except in the one contingency that she die leaving no issue, and that contingency not having happened, but she having died leaving issue, the estate was absolute, and would, in the absence of any other disposition, have passed to her heirs as such, and her children would have had no interest as devisees, though they might have taken as heirs. But in the meantime she and her son, defendant J. N. Green, disposed of her interest in the estate to the ancestor of defendants, and vested in him all their interest, share and estate. *Petty v. Moore*, 5 Sneed, 128; *Owen v. Hancock*, 1 Head, 563; *Alston v. Davis*, 2 Head, 266; *Cowan, McClung & Co. v. Wells*, 5 Lea, 684. These cases in substance hold that under like limitations and terms the birth and survival of a child determines the contingency, and the estate is vested and absolute, and there being no express limitation to the children, none will be implied, and they will take nothing as devisees.

There is a provision in the will that "upon the decease of either of my children without issue"

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her estate shall go over to the survivors or their issues, but this does not mean the issue of the daughter dying, but of the brother or sister, and, moreover, the contingency is the death of the daughter without issue, a contingency which did not happen in the case of Mrs. Green.

There are some expressions in the will which are relied upon as indicating an intention upon the part of the testator to limit the estate of his daughters and this is no doubt true, but the question is, To what extent do the limitations go? We think the expressions relied on only go to the extent of vesting the estate in trustees for the use of the daughters and in trust for the support and maintenance of their children, but not to the disposition of the estates after the death of the daughters, which is dependent alone on the contingency of dying without issue, so far as Mrs. Green is concerned.

It follows that there is no error in the decree of the Chancellor, and it is affirmed and the bill is dismissed as to all the defendants except J. N. Green. As to him it is affirmed, he not having prosecuted his appeal by assigning errors.

The cost of appeal will be equally divided between the complainant and said J. N. Green. The costs of the Court below will remain as adjudged by the Chancellor.

Dunscomb v. Randolph.

DUNSCOMB v. RANDOLPH.

*(Jackson. May 11, 1901.)*1. PARTY WALL. *Definition, nature and construction of.*

A party wall is the division wall between two connected and mutually supporting buildings, either both actually erected or one only contemplated, of different owners, connecting, but not necessarily standing half on the land of each, ordinarily maintained at mutual cost, and always with the right of each owner to insert therein his timbers. Its sources are three: An express or implied contract between the parties; prescriptive, which is a particular form of the implied contract; a statute, or municipal by-law. When it is by a contract the contracting terms, as judicially interpreted, determine the rights of the parties. (*Post*, pp. 97, 98.)

2. SAME. *Exists by contract, when.*

A division wall between two town lots, the property of different owners, is, in legal contemplation, a party wall, though erected wholly by one of the parties, in the main upon his own lot, where it was done under a contract with the other party that the footing, and, to a small extent, the wall, might be extended over on the latter's property, and that it should be so constructed that the latter might use it as a party wall, and that he should have the right to do so upon payment of one-half its value. (*Post*, pp. 98-101.)

3. SAME. *Neither party can cut opening in.*

Neither party has the right to cut windows or openings in a party wall, and will be enjoined from doing so. (*Post*, pp. 101-103.)

4. ESTOPPEL. *To deny party's right to maintain windows in party wall.*

One of the proprietors of a party wall, who permits the other to cut windows and openings in the wall at considerable expense, and by his conduct induces the belief that he does not object

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to same, is estopped afterwards to object to the continuance and maintenance of such windows or openings, in the absence of any showing of injury therefrom, or of any desire to use that part of the wall. (*Post*, pp. 103-105.)

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, Ch.

PIERSON & EWING for Dunscomb.

RANDOLPH & SONS and TURLEY & TURLEY for
Randolph.

McALISTER, J. The questions presented for our determination upon this record are, first, the right of the defendant, Randolph, to maintain windows and openings in a certain division wall between his premises and those of the complainant; second, the liability of complainant for the wall which stands near the shed erected by the complainant on the rear of his lot. The facts necessary to be stated for a clear understanding of the issues between the parties are that complainant and defendant are owners of adjoining lots on the east side of Main street in the city of Memphis. On the 18th of October, 1890, these adjacent proprietors entered into a written contract provid-

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ing for the erection of a division wall between their adjoining premises.

Defendant Randolph erected his building and wall, completing same on August 1, 1891. The Randolph building was seven stories in height, containing ten stores on the ground floor and about two hundred and forty rooms, or divisions for rooms, on the floors above the ground floor. The rooms are designed for the use of professional and business men for offices and places of business, and are largely occupied for those purposes. In 1893 defendant Randolph, in order to promote the comfort of his tenants as well as to increase the rental value of the property, caused windows to be cut in the south (division) wall on east floor of the building opposite each of the three main halls extending through from north to south. Those windows were put in without in any way weakening or injuring the wall of the building. Three windows were cut on the second floor, two on the third floor, two on the fourth floor, three on the fifth, and two on the sixth floor.

It further appears that in July, 1899, this injunction bill was filed by Mrs. Dunscomb against defendant, Randolph, in which it was alleged that the complainant was about to commence the erection of a building on her lot adjoining the Randolph premises, and that the windows and openings in the south wall of the Randolph building.

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made by the defendant, Randolph, for his own use and benefit, would obstruct and interfere with the complainant in the erection of her building, and were in violation of the contract, which gave complainant right to build to the south wall.

The bill prayed an injunction restraining the defendant from in any manner interfering with the use by the complainant of the wall as a party wall in the building she was about to commence.

The bill also prayed that the written contract be specifically performed by the defendant, Randolph, and that he be required to close all openings and windows in the wall and that he be required to fulfill the terms of the contract providing for the party wall.

It also prayed that the value of the wall space to be used by the complainant in the erection of her building be fixed and ascertained, to the end that she might pay the same.

An injunction issued as prayed upon the fiat of Hon. Jacob S. Galloway, Judge. Complainant then proceeded, and erected a two-story building, adjoining same to the division wall. On the 4th of December, 1899, the parties appeared in open Court and agreed, viz.:

First, that complainant had paid defendant, Randolph, the sum of \$1,458.88 as full payment for a half interest in that portion of the south wall of her building which had been used by the

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complainant in the erection of the two story building recently constructed by her.

Second, that defendant, Randolph, agreed at once to fill in and close up, at his own cost, the windows in the south wall which were covered or reached by the building of complainant, but did this, as he claimed, of his own volition and did not concede that the contract obligated him to do so, etc. This included, the agreement stated, the windows which were partially covered by the building of complainant as well as those which were completely covered by it.

The agreement further stipulated it was not to affect the right of complainant to demand that all the windows be closed, and this question was left open for determination in this cause, and all other questions not specifically settled were reserved. The agreement of the parties was made the decree of the Court.

Defendant, Randolph, then filed an answer and cross bill. In his cross bill defendant alleged that complainant, in addition to using the portion of the south wall of his building for the purpose of her two-story building, constructed a brick wall on the south and east side of his lot and attached it to the east end of the south wall of the Randolph building, making a compact wall on the east; that complainant then constructed on the south side of her lot a stable and shed, to be used as a shelter for animals; that the

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roofs of both the shed and stable rest upon and are connected with the top of the wall constructed by the complainant on the east and south sides of her lot. Defendant then stated that complainant is indebted to him for the value of the wall so used by her, in addition to the portion of the wall for which she has already paid.

Defendant, Randolph, then proceeded to state his understanding and interpretation of the written contract.

It is stated that the one purpose of the parties was to render the said wall of the building of the said Randolph sufficient and useful "as and for a party wall," and not then to make it a party wall, etc. This idea, it is claimed, is clearly expressed in the provision, to wit: "But if Mrs. Dunscomb or her representatives should hereafter conclude not to use the said Randolph wall as a party wall and build for herself, she may use the sixteen inches of footing to build upon as her wall."

It is then averred that as the complainant was not bound by the contract to use the wall as a party wall, but had the option to build her own wall, there was no obligation upon the said Randolph to treat the wall as a party wall in fact; or to anticipate the fact that complainant would ever use the wall as a party wall, until she made her election so to treat it and notified him of the fact.

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It is further insisted that no title to or interest in the wall or in the ground on which the wall stood was granted, but only the right to use it. In other words, complainant took no interest in the wall under the contract, but would acquire the interest when the use was made and then the interest would be valued and paid for.

It is further insisted that in the contract the wall is stated to be the wall of the said Randolph; that this wall was not a party wall, but complainant was authorized to make use of it "as and for a party wall." It is averred that no part of the wall was put upon the lot of complainant, but that it was placed exactly on the outside, along the south line of the property of the said Randolph and the north line of the property of the complainant.

It was further insisted by defendant that the wall being entirely on his land and having made no contract with complainant as to the construction or character of his own wall, he had at all times reserved and had the right to change or alter the wall as he saw proper, making openings therein for windows and doing with the wall as his own interest dictated, subject only to the terms and provisions of his contract with the complainant.

There is no allegation in complainant's bill that the windows cut on the south wall of the Randolph building in any way injure the complain-

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ant or her property, or interfere with her enjoyment of it, or decrease its value, or in any way inconvenience her or those who occupy her property.

The answer avers as a matter of fact that the windows are no injury or inconvenience whatever to complainant and do not increase the risk of fire on her premises or the rate of premium for insurance.

The answer also asserts that as complainant had for the first time elected to use the portion of the wall of the defendant, Randolph, after the windows had all been cut in the wall, she had by the contract only the right to use the wall in such condition; that complainant had built her house and had thus accepted the wall in the condition it was then in, with all the windows and without change, and had thereby estopped herself from objecting to the character of the wall and from insisting on the closing of the windows therein or the making of other changes.

It is further averred that Mrs. Dunscomb, through her agents, knew that the windows were being placed in the south wall of the Randolph building at the time they were constructed, and made no objection thereto.

The Chancellor, on the hearing, decreed that the complainant, Mrs. Marietta Dunscomb, was not entitled to require the defendant, Randolph, to

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close the windows as they now exist, in the south wall of his building, and dismissed the bill.

It was also decreed that Randolph was not entitled, under his contract, to recover for that portion of his wall adjoining the stable and shed, which had been erected in the rear of complainant's two-story building, and the Chancellor accordingly dismissed the cross bill. The cause is now before this Court on writs of error sued out by both parties.

Complainant Dunscomb's second assignment is, viz.:

"It was error in the Chancellor to hold that the south wall of the Randolph building could be maintained as a party wall, as was agreed by contract to be done, and at the same time allow openings therein, and the Court erred in refusing to grant the relief prayed for by the bill and in refusing to require the defendant, Randolph, to close the windows cut in the said wall by him since its erection."

We will first consider the legal character of the division wall in controversy, viewed in the light of the written contract of the parties and the law governing such walls.

Mr. Bishop, in his work on "Non Contract Law," thus defines a party wall, viz.:

Art. 914. "A party wall is the division wall between two connected and mutually supporting buildings, either both actually erected or one only contemplated, of different owners, commonly but

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not necessarily standing half on the land of each, ordinarily maintained at mutual cost, and always with the right of each owner to insert therein his timbers."

Art. 915. "Its sources are three—an express or implied contract between the parties, prescription, which is a particular form of the implied contract, a statute or municipal by-law."

Art. 916. " . . . When it is by a contract the contracting terms, as judicially interpreted, determine the rights of the parties." Bishop's Non Contract Law; Am. & Eng. Enc. of Law, vol. 18, p. 5.

In *Watson v. Gray*, 14 Ch. D., 192, 194, Fry, J., gives, among other definitions of the phrase "party wall," the following:

"Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement of right in the other to have it maintained as a dividing wall between the two tenants."

It will be observed, in the first place, that the object and purpose of constructing this wall is thus clearly expressed, viz.: "Whereas, it is desirable that the said wall of the said building of the said Randolph should be straight and also that the same should be so constructed that it may be used as a party wall by the said Randolph and the said Mrs. Marietta Dunscomb and those who may succeed to their respective rights."

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The location of the wall is then defined, viz.: "Upon the line of the said Randolph for its entire length, except at a point 95.1 feet from Main street, where it strikes the line of the said Mrs. Marietta Dunscomb 8.5 feet from the north line of a building now upon her lot and runs within the wall of said building about twenty-one feet, more or less, until it intersects the line dividing said lots of the said Randolph and the said Mrs. Marietta Dunscomb, and follow the said line thence to the west line of Mulberry street."

The contract proceeds to say:

"It is further agreed, in order to render the said wall of the said building of the said Randolph sufficient and useful as and for a party wall, as before contemplated, that the said Randolph, and his agents and employees, shall have the right to extend the footings from Main street on the west to Mulberry street on the east sixteen (16) inches beyond the outside line of said wall, and into the property of the said Mrs. Marietta Dunscomb, such footings to be and remain permanently a part of said wall."

It is then provided:

"It is further agreed between the said parties that the said Marietta Dunscomb, or her heirs or assigns, may at any time hereafter use the said wall to be erected by the said Randolph, . . . they paying at the time they use the same one-

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half the value of the entire wall so far as they make use of the same, such value to be ascertained by agreement between the parties at the time, or otherwise; such value, however, not to exceed the original cost of the wall used."

We think it quite plain from these provisions of the contract that it was the intention of the parties to establish this wall as a party wall.

The wall was to be built in part upon the ground claimed by Mrs. Dunscomb, for it is recited that the latter is to permit the house in the rear of her lot to be torn down and rebuilt by the said Randolph in order to straighten his line.

It is insisted by Randolph that Mrs. Dunscomb had no title to the 8 feet 5 inches, but it is admitted that she had possession, and was actually occupying the ground and voluntarily surrendered any right she might have in the premises in order to build this wall. *Deman v. Colberg*, 2 Shannon's Cases, 18.

It is further recited in the contract that the footings and foundations of this wall shall extend sixteen inches into the ground owned by complainant, Dunscomb.

But while these features of ownership are patent in the contract, that question is immaterial if it otherwise appears that a party wall was to be established.

In *Watson v. Gray*, 14 Ch. D., 192-194, Fry,

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Judge, among other definitions of a party wall, gives the following, to wit:

"Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenants." We are, therefore, of opinion that the written contract between the parties provided for the erection of a party wall in the legal acceptation of that term, and that as such both parties are entitled to have it maintained.

The wall, then, being in our opinion a party wall, the next question presented is whether either party may cut windows or openings in the wall.

The exact question was presented in *Graves et al. v. Smith*, 6 So. Rep. (Ala., 1889), p. 308, and it is said:

"There is no statute in the State regulating the subject of party walls, as in England and some of the American States. The question is, therefore, to be determined by the principles of the common law bearing on easements of this nature. It is our opinion that a party wall must ordinarily be construed to mean a solid wall, without windows or openings. Such openings tend to weaken the strength of the structure, and impair its value for lateral support of the adjoining building. They prevent, or render inconvenient, the utilization of the wall for the erection of an

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additional story for the building. They also increase the hazards of fire and injuriously affect the adjoining proprietor by unduly exposing his premises in various objectionable ways, which readily suggest themselves without any elaborate enumeration. If allowed to continue, moreover, for a period of twenty years, the privilege of the adjoining owner would mature into a perfect legal right under the doctrine of prescription. The cross easement which the appellee had in the wall was, in our opinion, violated by the attempt of the defendants to create the openings for the windows, sought to be restrained by injunction."

In *Milmer's appeal*, 81 Pa. St. Rep., 54, the defendant laid a foundation "partly upon the plaintiff's and partly on the defendant's line," but erected the wall "wholly within his own line," and in this wall made four windows. It was sought to have the same closed, and the bill was maintained, it being adjudged that the "defendant was bound to make the erection a solid wall," and it was further held: "If the builder starts the foundation as a party wall, thus taking the land of the adjoiner, he must carry it up so as to give the adjoiner all the benefits of a party wall."

The Court said: "The wall mentioned in the plaintiff's bill is clearly a party wall. The defendant could not, by receding upon the foundation of a part of it, carry up that part within

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his own line, so as to destroy the character of the entire wall, and thus secure to himself the privilege of openings in it inconsistent with its character as a party wall."

It is insisted, however, by defendants that complainant is estopped to object to the windows now complained of, since she consented to their being placed there. This contention is based upon the following state of facts. As stated, the contract between these parties was dated October 15, 1890. The Randolph building was completed about August 1st, 1891. No windows were opened until the year 1898. On the 16th of September, 1898, while the openings for the windows were being cut, Mrs. Dunscomb addressed defendant, Randolph, the following letter, to wit: "I am told that you are cutting windows in the south wall of your building, corner Main and Beal streets, and hereby notify you that I will hold you responsible for any damage to my property or to any one on my property by brick or other material falling."

About this time J. S. Dunscomb, Mrs. Dunscomb's son and agent, saw George Randolph, the son of the defendant, and told him he did not mean to threaten a lawsuit in the letter referred to, but simply to put the defendant, Randolph, on his guard, that no further damage might be done by brick falling on the roof of

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his mother's house and in the yard, endangering the tenants as well as the building.

There was no complaint of the windows being cut in the wall. Randolph thereupon, without further complaint from Mrs. Dunscomb, proceeded at considerable expense to finish cutting the windows, and they were thence used for the purposes of the building until July 21, 1899, when a formal complaint was made by letter of that date and the present injunction bill was filed. Complainant then proceeded and erected her two-story building during the pendency of the present suit.

It should be stated that after the agreed decree was entered herein, the defendant, Randolph, closed the four windows by bricking them up, thus making solid that portion of the wall covered by complainant's two-story building.

The windows which remain open are one on the second floor, two on the third, two on the fourth, three on the fifth, and two on the sixth floor. Complainant has no use for the wall at the present time, and the windows do not interfere with her building nor, according to the proof, do they increase the risk of fire or the rates of insurance.

We think that under the facts stated, Mrs. Dunscomb must be held to have acquiesced in the cutting of the windows and to the use of the wall by defendant for this purpose, until such time as she may desire to use the wall

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under the terms of the contract. If Mrs. Dunscomb had intended to object to this use of the wall by Randolph, she should have interposed this objection when the windows were being cut, but instead of this, she only objected to the damage, or injury, which might be done her property, or tenants, by falling brick or material, thus permitting Randolph to incur a large expense under the belief that complainant consented to the use of the wall.

We therefore hold that complainant is estopped by her letter and implied acquiescence in the cutting of such windows, as well as the representations of J. S. Dunscomb, her son and agent, to insist that the windows shall now be closed. But we do not mean to hold that complainant has forever estopped herself to demand that such windows be closed, but her acquiescence in the cutting of such windows, and their consequent use, will only be presumed until such time as she may desire to use the wall for the purposes contemplated by the contract.

So far as defendants' cross bill is concerned, we need say nothing further than that in our opinion the proof thereunder fails to establish any claim for recovery, and the same is dismissed.

For the reasons stated, the decree of the Chancellor is affirmed. The costs of the appeal will be divided.

Railroad v. Kuhn.

RAILROAD v. KUHN.

(Jackson. May 11, 1901.)

1. DECLARATION. *Sufficient for personal injury sustained in another State.*

In an action by a passenger against a common carrier for personal injury sustained from derailment and overturning of a coach in another State, it is not essential that the declaration shall aver the breach of any statute of that State. It is sufficient if the declaration avers a case of common law negligence. (*Post*, pp. 109, 110.)

Case cited and approved: Railroad v. Reagan, 96 Tenn., 128.

2. SAME. *Avers case of common law negligence.*

A declaration makes a *prima facie* case of actionable negligence, at common law, which avers that defendant is a common carrier, and that plaintiff, as its lawful passenger, was injured by derailment and overturning of its coach, in which he was traveling. (*Post*, p. 110.)

3. COMMON CARRIER. *Presumption of negligence from derailment of coach.*

Injury to passenger from derailment of a coach, in which he is traveling, raises a *prima facie* presumption of negligence on the part of a common carrier, and casts upon it the burden of showing that the accident causing the injury was unavoidable by the exercise, on its part, of the utmost degree of care, skill, and foresight. (*Post*, pp. 110-117.)

4. SAME. *Measure of duty to passengers.*

Common carriers are not insurers of the safety of their passengers, but they are held to the exercise of the greatest, highest or utmost care, skill, and foresight that human experience and observation and the known laws of nature suggest as conducive to the passenger's safety, and capable of being put into practice; or, to express it otherwise, they are held to the exercise of such active, solicitous care, skill, and foresight as intel-

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ligent, suitably-trained, and very cautious persons would be expected to exercise for their own personal protection in the same business and surroundings, and with the instrumentalities required and employed; and this obligation, in the case of railway carriers, applies not only to the selection and use of suitable carriages, motive power, appliances, and servants, as in case of stage lines, but also to the proper construction and maintenance of roadbed and tracks. (*Post*, pp. 124-131.)

Cases cited and approved: *Railroad v. Elliott*, 1 Cold., 611; *Railroad v. Messino*, 1 Sneed, 221; *Ferry Co's. v. White*, 99 Tenn., 256; *Transit Co. v. Venable*, 105 Tenn., 460.

Cited and distinguished: *Railroad v. Mitchell*, 11 Heis., 404; *Sommers v. Railroad*, 7 Lea, 204; *Young v. Bransford*, 12 Lea, 237; *Railroad v. Stewart*, 13 Lea, 437.

5. SAME. *Charge of Court correctly and sufficiently defines carrier's duty to passenger.*

In an action by a passenger against a common carrier for injury resulting from derailment of a coach, the Court's charge as to the carrier's duty is correct and adequate, and makes refusal to give additional requests proper, which is in these words, to wit: "In this case, if you believe from all the evidence that the sleeping car in which plaintiff was a passenger, was derailed and overturned as a direct and proximate result of a rain, which was so heavy, unusual, and extraordinary that it could not have reasonably been expected or anticipated by defendant railroad company, and that such unusual and extraordinary rain was the cause of a portion of defendant's railroad embankment giving away, and the consequent derailment of said sleeping car in which plaintiff was a passenger, and that said accident could not have been prevented by the exercise of the utmost degree of care and vigilance on the part of the defendant, then plaintiff cannot recover. . . . Defendant railroad company, as a common carrier, does not insure the absolute safety of its passengers, and is not responsible for the direct and violent acts of a nature which could not reasonably have been foreseen and guarded against or prevented by the exercise of a high degree of care, skill, and prudence, and if the defendant railroad company maintained its culvert and the railroad embankment at the point where the accident occurred in a good condition, and the same were safe for all emergencies which could reasonably have been anticipated by it, and at the time of the injury complained of defendant was in the exercise of the utmost degree of care and

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prudence, both in the matter of the maintenance of said embankment and in the operation of its trains over the same, then said defendant is not liable. If you find from the testimony that defendant was without negligence in the construction and maintenance of the culvert, and that the injury to plaintiff was the result of an inevitable accident, and such as no human foresight could avert, then the defendants would not be liable, and your verdict must be in favor of the defendant." (*Post*, pp. 120-122.)

6. SAME. *Charge correctly defines carrier's duty as to construction and maintenance of bridges and culverts.*

In an action by a passenger against a common carrier for injury sustained by derailment of car caused by defective culvert, the Court's charge is correct and adequate in these words, to wit: "The measure of diligence required in the maintaining of bridges and culverts by railroad companies is that the character and size of the stream, the extent and situation of the agricultural land about it, and the nature of the rainfalls and floods affecting it, shall be ascertained and provided for so far as the exercise of ordinary foresight, care, and skill can accomplish them, but there is no requirement that the recurrence of cyclones, cloudbursts, and the like shall be foreseen, or guarded against, though it is known that they have many times happened. And, therefore, if you find from the proof that the culvert was of sufficient capacity to carry off safely all ordinary accumulations of water, and that the defendant constructed and maintained the same with due care and frequently inspected the same, and it appeared to be amply sufficient for all purposes, then the Court charges you that the company would not be liable for the injury suffered by the plaintiff from such extraordinary downpour of rain, or cloudburst, as overtaxed the capacity of said culvert and caused a washout in same." (*Post*, pp. 122, 123.)

7. PROXIMATE CAUSE. *What is.*

Where the unsafe condition of a culvert that causes derailment of a coach and injury to a passenger has been caused by the concurrence as proximate causes of the act of God, to wit: an unprecedented rain, and the negligence of the carrier in its construction or repair, the carrier is liable for such injury of its passenger, provided it is reasonably certain that the unprecedented rain would not alone, without the concurring negli-

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gence of the carrier, have produced the same result. (*Post*, pp. 123, 124.)

Cases cited and approved: *Boeppe v. Railroad*, 104 Tenn., 427; *Express Co. v. Jackson*, 92 Tenn., 327.

8. CHARGE OF COURT. *Refusal of requests proper.*

It is not error to refuse to give additional instruction, upon request of a party, where same are substantially covered by the original charge. (*Post*, p. 123.)

Cases cited and approved: *Kaufman v. Fye*, 99 Tenn., 145; *Railroad v. Pugh*, 97 Tenn., 624; *Railroad v. Reagan*, 96 Tenn., 129.

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

FENTRESS & COOPER for Railroad.

WATSON & FITZHUGH for Kuhn.

CALDWELL, J. On the night of April 29 a sleeping car, attached to a passenger train of the Illinois Central Railroad Company, was derailed, and thrown down an embankment, near the village of Boaz, Kentucky. Simon Kuhn, one of the sleeping passengers, was thrown violently from his berth and seriously injured in his person.

Some time thereafter he sued the company in the Circuit Court of Shelby County, Tennessee, and there obtained verdict and judgment for

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\$1,000 damages. From the action of the trial Judge in refusing a new trial, the company prosecutes this appeal in error.

The first assignment of error complains of the failure of the Court below to sustain the demurrer which challenged the plaintiff's declaration for not averring that the wrong therein attributed to the defendant was actionable under some law or statute of the State of Kentucky, where his injury was received.

The demurrer was rightly overruled. Having sued to enforce a common law liability only, it was not necessary that the plaintiff should aver the existence of any local law giving him a right of action. It was sufficient in such case, for him to aver with reasonable circumstantiality, as he did, that the defendant was a common carrier, and that, while its lawful passenger, the car in which he was being transported was overturned, to his personal injury and damage. That was enough to disclose an actionable breach of common law duty on the part of the defendant, and more was not required by any rule of good pleading. *Railroad v. Reagen*, 96 Tenn., 128-137.

The second assignment of error is directed against the refusal of the Court to instruct the jury that "the burden is upon the plaintiff, Kuhn, of showing, affirmatively, negligence on the part of the defendant."

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This instruction is not sound, hence its refusal by the Court was proper.

Although not insurers against all damage caused otherwise than by the act of God or the public enemy, as common carriers of goods are, passenger carriers are nevertheless legally bound to exercise the utmost degree of care, skill and foresight to accomplish a safe transportation; and this obligation as to railway carriers, includes the requisite attention not only in the selection and use of suitable carriages, motive power, appliances and servants, as in the case of stage lines, but also the proper construction and maintenance of roadbed and tracks. Hutchinson on Carriers (2d Ed.), Secs. 498 to 505 inclusive, and 524-533; 4 Elliott on Railroads, Secs. 1583 to 1589, inclusive; Ray's Negligence of Imposed Duties, Sec. 4; Cooley on Torts, 642; *Christie v. Griggs*, 2 Camp., 79; *Stokes v. Saltonstall*, 13 Peters, 181, 191; *Pennsylvania Co. v. Roy*, 102 U. S., 451; *Gleason v. Virginia Midland Railroad Co.*, 140 U. S., 435; *Ingalls v. Bills*, 9 Met., 1; *Railroad v. Elliott*, 1 Cold., 611, 616; *Railroad v. Messino*, 1 Sneed, 221; *Railroad v. Mitchell*, 11 Heis., 400; *Ferry Cos. v. White*, 99 Tenn., 256, 264, 265; *Railroad v. Sanger*, 15 Grattan, 230, 237; *Dodge v. Steamship Co.* (Mass.), 2 L. R. A., 84, and note; *Palmer v. Pennsylvania Co.* (N. J.), 2 L. R. A., 252, and note; *Railroad v. Anderson* (Md.), 8 L. R. A., 673, and note; 13 L. R.

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A., 95, note; Wharton on Law of Negligence, Secs. 626 to 636; 5 Am. and Eng. Enc. of Law, 519 to 537, inclusive, and citations; 1 Shearman and Redfield on Negligence (5th Ed.), Sec. 51; 2 Ib., Secs. 494, 495, 497, 499.

Human experience and observation, in connection with the laws of nature, have shown that a faithful discharge of those duties ordinarily prevents the upsetting of the stage coach or the derailment of the railroad car, and that such a catastrophe seldom occurs except through the omission of some part of the carrier's obligation.

Therefore, all the law required of this plaintiff, in the first instance, was to show that the defendant was a common carrier, that he was its lawful passenger, and that the injuries sued for were caused by the derailment and overturning of the coach in which he was traveling.

That, without more, was sufficient to constitute a *prima facie* case of actionable negligence on the part of the defendant; and, to rebut the presumption of negligence arising from proof of those facts, it was incumbent on the defendant to prove that it had done all within its power to avoid a disaster of that kind. *Stokes v. Saltonstall*, 13 Peters, 181; *Railroad Co. v. Pollard*, 22 Wallace, 341; *Gleeson v. Virginia Midland Railroad Co.*, 140 U. S., 435, 443; 2 Shear. & Red. on Neg., Secs. 516, 517; 4 Elliott on Railroads, Sec. 1634; Ray's Neg. of Imp. Du., Sec.

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5, pp. 24, 25; 5 Am. and Eng. Enc of Law (2d Ed), 627.

Other cases to the same effect are very numerous, but they need not be cited in this opinion. Many of them are referred to in notes by the text writers just mentioned.

Transit Co. v. Venable, 105 Tenn., 460, which is a case of collision, stands upon the same ground as this one, and, hence, is authority for the foregoing proposition.

The plaintiff in the case of *Gleeson v. Virginia Midland Railroad Co.*, supra, was a clerk on a postal car being transported by the defendant. A portion of this train was derailed by a landslide and in the disaster the plaintiff received the injuries sued for.

In the course of the opinion Mr. Justice Lamar, speaking for the Court, said: "Since the decision in *Stokes v. Saltonstall*, 13 Pet., 181, and *Railroad Company v. Pollard*, 22 Wall., 341, it has been settled law in this Court that the happening of an injurious accident is, in passenger cases, *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care), the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight."

The rule announced in those cases has received

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general acceptance, and was followed at the present term in *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S., 551; 140 U. S., 443.

The present case is readily differentiated from that of *Railroad v. Mitchell*, 11 Heis., 400, upon the fact that here the injury resulted from a derailment of the coach in which the plaintiff was riding, while there the injury in suit resulted from the falling of the plaintiff's intestate under the wheels of a moving car as he was attempting to alight therefrom.

The one occurrence implies negligence on the part of the defendant, the other does not. This distinction was drawn in that case. 11 Heis., 404, 405. Also, in *Sommers v. Railroad*, 7 Lea, 204, 205, and *Young v. Bransford*, 12 Lea, 237, and *Railroad v. Stewart*, 13 Lea, 437.

The very nature of the fact that a passenger has been injured by derailment of a train or car indicates some omission of duty by the carrier and creates a presumption of negligence on its part. 2 Shear. & Red. on Neg., Sec. 516; 4 Elliott on Railroads, Sec. 1634, p. 2566; Hutchinson Car., Secs. 800, 801; 5 Am. and Eng. Enc. of Law (2d Ed.), 627.

Judge Elliott, after defining the high degree of care to be exercised by passenger carriers and referring to derailments, on the page cited uses this language, viz.:

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"As such so-called accidents do not ordinarily happen, however, unless the company fails to exercise such care, and as it is better able to explain how they happened, proof of the derailment of the car and injury thereby caused to the passenger generally raises a presumption that the company was negligent. But the presumption is not conclusive, for it may be rebutted by showing that the injury arose from an unavoidable accident, or an occurrence which could not have been prevented by the highest practicable degree of care and foresight."

For the same reason negligence on the part of the carrier is presumed from the fact that a passenger receives injuries in a collision. *Transit Co. v. Venable*, 105 Tenn., 460; 1 L. R. A., 681, note; 4 Elliott on Railroads, Sec. 1635; 5 Am. and Eng. Enc. of Law (2d Ed.), 625, and cases cited.

The rule is fully stated and elaborately illustrated in section 516 of 2 Shearman & Redfield on Negligence, as follows:

"The mere fact of an injury suffered by a passenger, while on his journey, without any evidence connecting the carrier with its cause, is not sufficient to raise a presumption of negligence on the part of the carrier. But proof of injury suffered from contract with anything for which the carrier was responsible, or which, as a general rule, he ought to have guarded against, or from

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the absence of anything which, as a general rule, he ought to have supplied, is sufficient to put him upon his defense.

"Having established so much, the plaintiff is entitled to recover, without proving affirmatively that the surrounding circumstances were of that character to which the general rule was meant to apply, and without showing by what particular acts of misconduct or negligence the injury was occasioned.

"Thus, for example, it is a general rule that a railroad company must maintain a good track and roadbed. Proof of a breach of the track, by which the cars were thrown off, is therefore sufficient evidence of negligence to put the company upon its defense in an action by a passenger.

"So, in general, a railroad company is bound to keep its track clear; and therefore the presence of an animal or other obstruction upon the track, causing an injury to a passenger, is presumptive evidence of negligence.

"On the same principle the mere fact of a train coming into collision with another train, or having run off the track, or being several hours behind time, or the breaking of an axle or wheel, or the fall of a bridge is *prima facie* evidence of negligence.

"So the overturn of a car or stage coach, or the coming off of a wheel, or the breaking of a

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steamboat's paddle or propeller, or the bursting of its boiler, is presumptive evidence of negligence, in favor of a passenger injured thereby. Indeed, whenever it is made to appear that the accident resulted from defects in defendant's roadbed, machinery, appliances, or method of operating the road, the presumption of negligence arises, and the onus then rests upon the defendant to show that the injuries were caused without its fault."

The rule and the reason for it are similarly expressed and exemplified in sections 800 and 801 of Hutchinson on Carriers.

Immediately after the present disaster, which occurred at night, in an agricultural district and about midway between two small stations, it was discovered that a brick culvert and the adjacent embankment of earth and roadbed had been so far washed out as to weaken the foundation of the track to such an extent that it gave way, and thereby derailed and overturned the sleeping coach after the preceding part of the train had passed over.

In explanation of the hurtful portion of these undisputed facts and in self-exoneration, the defendant introduced testimony tending to show that the culvert had always been in good repair up to that night, and of ample capacity to carry away all water coming to it, and that the wash-out had just been caused by an unprecedented downpour of rain, or waterspout, so sudden and

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confined to so limited an area that the company's agents and servants at neither of the neighboring stations, or elsewhere, had been able to anticipate or discover it before the wreck actually occurred.

The plaintiff, on the other hand, introduced testimony tending to show that the culvert had been out of repair for some time, that a part of its floor and lateral support had been washed away previously and never replaced, and that the rainfall that night, though a hard one, was not unprecedented in that locality.

The third and fourth assignments of error are based upon the Court's declination to give the jury the instruction following, to wit:

"If you are satisfied from the evidence that the culvert of defendants was constructed and maintained in a reasonably safe and proper manner and had successfully withstood for a number of years the ordinary floods in that immediate neighborhood and was of sufficient size and capacity to allow, ordinarily, all the accumulated water to pass, but on the night of the accident there was an unprecedented downpour of rain and a sudden and extraordinary flood, resulting in the sudden impairment of said culvert, whereby the track and embankment sank to such an extent as to derail the car in which plaintiff was a passenger, and all this happened in the night time before defendant had, or reasonably could have had, notice

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of its impairment and repaired the same, then the defendant would not be liable, and plaintiff cannot recover.

"The duty of the defendant company as to its tracks and culverts is adequately performed if they be so constructed and maintained as to resist the ordinary and probable action of the elements.

"2. It is contended by the defendant that there was an unprecedented rainfall in that immediate vicinity and to the west of the culvert, which defendant claims amounted to a waterspout; that the water accumulated at the fill near the railroad track, in larger quantities than could be carried off by the brick culvert which had been built there when the road was originally constructed, to wit: twenty years or more prior, and that the same was always regarded as safe, and had always been of sufficient capacity. Defendant further claims that the washout and break in the track occurred on a dark, stormy night, and that the sleeper in which the plaintiff was a passenger was precipitated without any negligence on the part of the company from the track, injuring plaintiff.

"The Court charges you, if you find the facts this way, then the railroad company would not be liable, and your verdict should be in favor of the defendant.

"3. If you find from the proof that this culvert had withstood all ordinary accumulations and

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flow of water for a long period prior to the accident, and that the same was properly constructed and maintained, and that on the night in question the culvert had proved insufficient to carry the water off, and a great pond had been forced above the fill, and the water bored the fill out, leaving the rails and ties of the track unbroken, and that this happened at a time of night and under circumstances which rendered it impossible for the train men and track men to know exactly the situation, and you further find that there had been no considerable rain immediately north of the accident and immediately south of the accident, where the defendant's section men had their section houses, and nothing unusual either north or south of said place called their attention specifically to this downpour of rain, and you further find that the engine, machinery and cars were in good condition, and that under these circumstances the engine and train were moving at a reasonable rate and that the car in which the plaintiff was a passenger was under these circumstances derailed and he was injured, then the defendant would not be liable and your verdict would be in favor of the defendant."

The charge, which the Court delivered to the jury before these instructions were requested and declined, contained these passages, namely:

"In this cause, if you believe from all the evidence that the sleeping car in which plaintiff

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was a passenger, was derailed and overturned as a direct and proximate result of a rain which was so heavy, unusual and extraordinary that it could not have reasonably been expected or anticipated by defendant railroad company, and that such unusual and extraordinary rain was the cause of a portion of defendant's railroad embankment giving away, and the consequent derailment of said sleeping car in which plaintiff was a passenger, and that said accident could not have been prevented by the exercise of the utmost degree of care and vigilance on the part of the defendant, then plaintiff cannot recover. . . . Defendant railroad company, as a common carrier, does not insure the absolute safety of its passengers, and is not responsible for the direct and violent acts of nature which could not reasonably have been foreseen and guarded against or prevented by the exercise of a high degree of care, skill, and prudence, and if the defendant railroad company maintained its culvert and the railroad embankment at the point where the accident occurred in a good condition, and the same were safe for all emergencies which could reasonably have been anticipated by it, and at the time of the injury complained of defendant was in the exercise of the utmost degree of care and prudence, both in the matter of the maintenance of said embankment and in the operation of its trains over the same, then said defendant is not liable.

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“If you find from the testimony that defendant was without negligence in the construction and maintenance of the culvert, and that the injury to plaintiff was the result of an inevitable accident, and such as no human foresight could avert, then the defendants would not be liable, and your verdict must be in favor of the defendant.

“The measure of diligence required in the maintaining of bridges and culverts by railroad companies is that the character and size of the stream, the extent and situation of the agricultural land about it, and the nature of the rainfalls and floods affecting it shall be ascertained and provided for so far as the exercise of ordinary foresight, care, and skill can accomplish them, but there is no requirement that the recurrence of cyclones, cloudbursts, and the like shall be foreseen, or guarded against, though it is known that they have many times happened. And, therefore, if you find from the proof that the culvert was of sufficient capacity to carry off safely all ordinary accumulations of water, and that the defendant constructed and maintained the same with due care and frequently inspected the same, and it appeared to be amply sufficient for all purposes, then the Court charges you that the company would not be liable for the injury suffered by the plaintiff from such extraordinary downpour of rain, or cloudburst as overtaxed the ca-

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capacity of said culvert and caused a washout in same."

Those propositions are sound, pertinent, and ample to present the defendant's theory of the catastrophe; and though different in phraseology, they really cover all material points in the declined instructions. It was not incumbent on the Court, therefore, to add those instructions, nor error to decline them. *Kaufman v. Fye*, 99 Tenn., 140; *Railroad v. Pugh*, 97 Tenn., 624; *Railroad v. Reagan*, 96 Tenn., 129.

. It is not a matter against the charge in point of legal soundness, that the part just quoted carries the necessary implication, and another part actually states in substance that the defendant, to avoid liability for the natural consequences of the derailment, must show not only that it resulted from an unprecedented rain as a proximate cause, but also that the defendant was free from proximate negligence in connection with the condition and capacity of the culvert, track, and roadbed, and in the equipment and operation of the train. For, if the defendant's omission of duty in respect of any of those things concurred as a proximate cause with an unprecedented rain in producing the derailment, the defendant would be guilty of actionable negligence, notwithstanding the occurrence and harmful operation of such a rain as an "act of God" in the legal sense.

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“It is universally agreed that if the damage is caused by the concurring force of the defendant’s negligence and some other cause for which he is not responsible, including the ‘act of God’ or superior human force directly intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage, within the definition already given. It is also agreed that if the negligence of the defendant concurs with the other cause of the injury in point of time and place, or otherwise so directly contributes to the plaintiff’s damage that it is reasonably certain that the other cause alone would not have sufficed to produce it, the defendant is liable, notwithstanding he may not have anticipated or been bound to anticipate the interference of the superior force which, concurring with his own negligence, produced the damage. But if the superior force would have produced the same damage, whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury.” 1 Shear. & Red. Neg., Sec. 39; Hutchinson Car., Secs. 179, 180, 513, 515; *Beopple v. Railroad*, 104 Tenn., 427; 2 Thomp. Neg., 1085, 1087; *Express Co. v. Jackson*, 92 Tenn., 327; 4 Elliott on Railroads, Sec. 1457.

Nor was it error for the Court to tell the jury that, as to passengers, the defendant was legally bound to exercise “the utmost degree of

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care and prudence, both in the matter of the maintenance of said embankment and in the operation of its trains over the same," and that "any neglect to use" such care and prudence, if operating as a proximate cause of the plaintiff's injury, would subject the defendant to liability for the damages sustained by him.

The assignment of error calls in question the phrase, "utmost degree of care and prudence," upon the alleged ground that it exacted greater care and diligence of the defendant than the law requires.

The exaction made in the charge is amply justified by the authorities already cited on that subject in a former part of this opinion. The adjudged cases and text-writers are unanimous in holding passenger carriers to a very strict accountability, the principal difference being in the phraseology of the rule, which some express in one form and others in other forms.

The formulation adopted by the trial Judge has heretofore met the approval of this Court (1 Sneed, 226; 1 Cold., 616; 99 Tenn., 264, 265), and probably occurs as frequently as any other to be found in the books.

The following are some of the many authorities in which the word "utmost," as in this case, is used to define the degree of care and prudence, or skill or caution, or diligence or vigilance or foresight, legally incumbent on passenger carriers.

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namely: *Stokes v. Sallonstall*, 13 Peters, 190; *Pennsylvania Co. v. Roy*, 102 U. S., 456; *Dodge v. Steamship Co.* (Mass.), 2 L. R. A., 84; *Ingalls v. Billis*, 9 Mat, 1; *Railroad Co. v. Anderson* (Md.), 8 L. R. A., 673; *Coddington v. Railroad Co.*, 102 N. Y., 66; *Flint v. Norwich*, 6 Blatchford, 158; *Heucke v. Railroad*, 69 Wis., 401; *Pittsburg v. Hinds*, 53 Pa. St., 512; *Railroad v. Pittsburg*, 123 Ill., 9; *Railroad v. Messino*, 1 Sneed, 226; *Ferry Cos. v. White*, 99 Tenn., 264, 265; *Jackson v. Tallett*, 3 Stark, 37; 3 E. C. L., 307; 2 Rap. & M. Dig. of R'y Law, Sec. 139, and citations; Booth on Street Railways, Sec. 328; Ray's Neg. Imp. Du., p. 24; Wharton Law of Neg., Sec. 636; 1 Shear. & Red. Neg., Sec. 51, and notes; 2 Ib., Sec. 495, and notes; Hutchinson Car., Secs. 799, 800, 801, 501, and notes. These notes cite a large number of the other adjudged cases in which the word "utmost" has been approved in the connection stated.

The language used by this Court in *Railroad v. Messino*, supra, is as follows:

"When railroad companies engage in the business of common carriers they undertake that the road is in good traveling order and fit for use, and that the engines and carriages employed are roadworthy and properly constructed, and furnished according to the present state of the art, and, if an injury results from the imperfection

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of the road, carriages, or the engines, the companies are liable, unless the imperfection was of a character in no degree attributable to their negligence. They are also bound for a due application upon the part of their servants and agents of the necessary attention, art, and skill, and if the injury to the plaintiff might have been avoided by the utmost degree of care and skill on the part of the agents and servants of the companies, they are liable." 1 Sneed, 226.

This Court employed the word "highest" in the same connection, and to express exactly the same thought, in *Railroad v. Elliott*, 1 Cold., 616; and other Courts have done likewise. *Le Barron v. Terry Co.*, 11 Allen, 315; *Taylor v. Railroad*, 48 N. H., 304, 316; *Dodge v. Steamships Co.* (Mass.), 2 L. R. A., 87, and note p. 84; *Ib.*, 252, note; 13 L. R. A., 95, note; *Coddington v. Railroad Co.*, *supra*; *Heucke v. Railroad*, 69 Wis., 401; *Boothe Street Railways*, Sec. 328.

In the cases of *Railroad v. Derby*, 14 How., 486, and *Steamboat v. King*, 16 How., 474, and *Pennsylvania Co. v. Roy*, 102 U. S., 455, the Court remarked: "When carriers undertake to convey persons by the powerful agency of steam, public policy and safety require that they be held to the greatest possible care and diligence."

Other authorities, like the Court in one instruction in this case, giving still another expression

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of the same rule of strict accountability, charge passenger carriers with all that "human foresight" can suggest for the safety of their customers. *Christie v. Griggs*, 2 Camp., 79; *Gleeson v. Railroad*, 140 U. S., 443; *Stokes v. Saltonstall*, 13 Pet., 191; *Weed v. Railroad*, 5 Duer, 193; *Maverick v. Railroad*, 36 N. Y., 378; 8 L. R. A., 673, note; 2 Ib., 85, note; 2 Shear. & Red. Neg., Sec. 495; *Hutchinson Car.*, Secs. 500, 501, 502; *Wharton Law of Neg.*, Sec. 636; *Boothe Street Railways*, Sec. 328.

Judge Cooley says the carrier's legal undertaking with his passengers is, "that, as far as human foresight and care can reasonably go, he will transport them safely." Cooley on Torts, 642.

Hutchinson (Sec. 501) indicates a preference from the adjudged case, for the phrase, "as far as human care and foresight will go" (which seems to have originated with *Christie v. Griggs*, 2 Camp., 79, cited and followed in *Stokes v. Saltonstall*, 13 Pet., 191, and other cases), saying, however (Sec. 502) that it does not signify "all the care and diligence of which the human mind can conceive," but only "the highest degree of practical care, diligence, and skill."

Another distinguished author thinks the true rule deducible from the multitudinous adjudications, many of which he cites in notes, is best defined when it is stated that the carrier is bound to exercise

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"the highest practicable care." 4 Elliott on Railroads, Secs. 1585, 1586, 1587, 1634.

An authority which has already been cited herein, says: "The law very wisely exacts from a common carrier of passengers for hire in the performance of his duties as such, the utmost care and skill which very prudent and skillful men would use under similar circumstances for their own protection; or, as it is sometimes expressed, he must use 'the highest degree of practicable care,' or extraordinary care; or must provide for 'safe conveyances so far as human care and foresight can secure that result;' and such a carrier 'is responsible for the slightest neglect to use such care.'" 2 Shear. & Red. Neg., Sec. 495.

And again: "It is the settled rule of the common law throughout the United States, and probably also in Great Britian and Ireland, that common carriers of persons, and especially railway conveyances, are liable for any damage suffered by their passengers which is proximately caused by the failure of such carrier to use the highest degree of prudence, and, in some cases, the utmost human skill and foresight."

This precise language is constantly used in charging juries, and it is sustained by such controlling authority as to make it useless to discuss its propriety at any length. But, while those words cannot be excepted to, the current of decis-

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ions shows that a carrier is entitled to have them explained to the jury. The Courts do not hold that carriers are bound to use the highest degree of prudence or skill which could be conceived of as possible to man. They are only held to the highest degree which has been demonstrated by experience to be practicable. 1 Ib., Sec. 51.

In the case of *Pennsylvania v. Roy*, supra, the Court, after reviewing several of its former decisions, said: "These and many other adjudged cases, cited with approval in elementary treatises of acknowledged authority, show that the carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger." 102 U. S., 456.

Thus it is seen, as already observed, that the authorities with unanimity hold common carriers of passengers to a strict accountability; that, notwithstanding great diversity of phraseology in defining the measure of their legal obligation to passengers, the various definitions are intended and understood to express substantially the same idea;

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and that perhaps no words are more generally used in that connection than those employed by the trial Judge in this case, namely: "The utmost degree of care and prudence."

The meaning, whether of one formula or another, is that the carrier is legally bound to exercise the greatest, highest, or utmost care, skill, and foresight that human experience and observation and the known laws of nature suggest as conducive to the passenger's safety, and capable of being put into practice; or such active, solicitous care, skill, and foresight as intellegent, suitably trained, and very cautious persons would be expected to exercise for their own personal protection in the same business and surroundings, and with the instrumentalities required and employed.

Of the other assignments of error it suffices to observe generally that none of them present any erroneous action on the part of the Court below.

Let the judgment be affirmed.

Randolph v. Thomas.

RANDOLPH v. THOMAS.

(*Jackson*. May 18, 1901.)

1. MORTGAGES AND DEEDS OF TRUST. *Sale under void, when.*

A sale of land, made by the trustee pursuant to a deed of trust, is void where both the secured debt and the deed of trust are barred by the statutes of limitation, and such sale will be vacated and set aside at the suit of the maker of the deed, his heirs or devisees.

Act construed: Acts 1885, Ch. 9.

Cases cited: *McElwee v. McElwee*, 97 Tenn., 649; *Runnels v. Jacobs*, 100 Tenn., 397; *Hawley v. Reid*, 101 Tenn., 438.

2. SAME. *Not revived by new promise, when.*

A provision in a note that it shall stand as secured by the same mortgage that the maker had given to the payee to secure, another note does not constitute such new promise as will revive or keep alive the mortgage or the debt therein secured.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, Ch.

RANDOLPH & RANDOLPH for Randolph.

F. ZIMMERMAN, W. W. GOODWIN, and J. M.
STEEN for Thomas.

Randolph v. Thomas.

WILKES, J. In 1885, Watkins executed a trust deed upon his real estate, to secure a note for \$300. This note was dated December 21, 1885, and was due one year after date. The trust deed, in the usual form, was registered December 21, 1885. On August 8, 1891, he executed a certain note to Reichman for \$175, payable twelve months after date. This note had a provision as follows: "This note shall be held good on or by the same mortgage that was given for the security of a note for \$300, dated December 21, 1885."

Watkins died December 31, 1896, indebted to a number of persons. He left a will, made July 19, 1890, which, in substance, provided that his executrix, Mrs. Ann Thomas, should take possession of his real property, collect the rents, and pay the expenses until his lawful heirs appeared. This will was probated. The executrix qualified January 2, 1897, and took possession of the real estate. On May 22, 1897, she suggested the insolvency of the estate. About June 1, thereafter, Reichman sold the real estate conveyed to him in trust, for the purpose of satisfying the \$300 note, and Mrs. Haynes, daughter of Mrs. Thomas, bought it for \$1,180. The trustee made her a deed. On the same day as the sale Reichman transferred to Mrs. Thomas the note for \$175. After satisfying the \$300 note and interest, in all \$368.20, out of the proceeds of sale there remained \$811.80, which the executrix

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reported as having received, but that it was not sufficient to pay the debts of the estate.

Randolph & Sons, creditors in the sum of \$250, filed, on February 5, 1898, a general creditor's bill, to administer on the estate as insolvent, attacked the sale made by Reichman, claimed that the debt was barred by the statute of limitations, and the trust deed also, and sought to subject the real estate to sale for the payment of debts and to distribute the proceeds.

The note secured by the trust deed matured December 21, 1886; the deed of trust was made and registered December 21, 1885. The sale made by the trustee was on June 9, 1897. Mrs. Thomas bought in the claim of Randolph & Sons, took an assignment of it, and holds it as a claim against the Watkins estate. Mrs. Thomas, answering the bill of Randolph & Sons, admitted that the sale by Reichman was void, and she asked that it be set aside and the property be sold to pay the debts of the estate.

Mrs. Haynes and her husband filed a similar answer and cross bill, asking that the sale be set aside and all parties be restored to their original status, and that the property be sold to pay debts.

On February 21, 1899, the heirs of Andrew Watkins appeared and filed an answer and set up heirship to the land. On August 27, 1900, Mrs. Reichman filed a cross bill, alleging her husband's death and that she was his executrix. She insisted

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that the sale was valid, and passed title to the property, and should not be set aside; that after Mrs. Haynes bought the property she executed a deed of trust on it for \$500, which grew out of the purchase of it, and was a part of the consideration, and she sought to validate this trust deed, but in the alternative that if the sale was set aside she should be allowed the two notes of \$300 and \$175, and that they be paid out of the funds of the estate.

The heirs of Watkins insisted that the two notes for \$300 and \$175 were barred by the statute of six years, and the statute of two years and six months, as against the estate of Watkins, and they filed their bill of *Watkins v. Thomas*, to set up claim to the lands and seeking to recover the same. Of course, this bill would be subject to the results in the case of *Randolph v. Thomas*, to apply the real estate to payment of debts. The causes were heard together.

The Chancellor held that the sale by Reichman, trustee to Hayes, was void, and set it aside, as well as the trust deed made by Mrs. Haynes and her husband to secure the \$500 note. He further held that the \$300 note was barred, and so, likewise, was the trust deed to secure it; but that the language used in the \$175 note created an equitable lien on the real estate, and it was a valid claim against the estate, not barred by the statute of limitations, and entitled to priority on half the estate. He held

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that the parties claiming to be heirs of Andrew Watkins were such heirs and entitled to the real estate, subject to the debts of the estate.

A reference was had to report, as is usual in insolvent proceedings.

Fredericka Reichman, alone, appealed, and limited her appeal to so much of the decree as adjudged the sale to Mrs. Haynes to be void and from that portion holding the note of \$300 barred.

These appear, therefore, to be the only questions involved in this Court on the appeal.

The first three assignments of error go to the point that the sale by Reichman, trustee, to Mrs. Haynes was not void, and should have been sustained.

We think the note and deed of trust were both barred by the statute of limitations when this sale was made. The deed of trust was made December 21, 1885. The note secured by it was due December 21, 1886. The sale under the trust deed was made June 9, 1897, or more than ten years after the deed of trust and note matured, and both were barred by statute. Acts of 1885, Ch. 9, Sec. 1; Shannon, § 4464; *McElwee v. McElwee*, 97 Tenn., 649; *Runnells v. Jacobs*, 100 Tenn., 397; *Hawley v. Reid*, 101 Tenn., 438.

It is insisted that the trust deed was renewed and extended by the provisions of the \$175 note. We are of opinion the note is not in substance or law a renewal of the original deed of trust nor the

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creation of a new one, but it is simply a note which is secured by the original trust deed to the extent only of its terms and provisions. The sale was not made to satisfy this note for \$175, but only for the \$300 note. The note was never registered. The \$300 note, we think, is barred by the statutes of six years and two years and six months, unless it has been kept alive by new promises as to the six-years statute, and by a request for delay as to the statute of two years and six months.

We do not, as before intimated, think that the execution of the \$175 note in any way affected the \$300 note, and it did not purport, nor was it intended to extend the \$300 note, but merely to give the \$175 note the same security as the \$300 note had. The oral evidence, as we think, fails to show a new promise. There is really no replication to the plea of the statute of limitations, nor any other pleading setting up any new promise.

It is said the heirs of Andrew Watkins have not established their relationship and status as heirs. This question is not embraced by the limited appeal prayed and granted. But the evidence is sufficient, if it were.

Upon the whole case, we find no error in the record, and the decree of the Court below is affirmed with costs, and the cause remanded for further proceedings.

McLean v. Caldwell.

MCLEAN v. CALDWELL.

(*Jackson*. May 18, 1901.)

1. LEASE. *Purchaser became assignee of, when.*

The purchaser at foreclosure sale of a leasehold interest in realty assumes, upon taking possession, the relation of a privy in estate with the original lessor, and is treated as an assignee of the lease, having all the rights and incurring all the obligations pertaining to that character. (*Post*, pp. 139-142.)

Case cited and approved: *State v. Martin*, 14 Lea, 93.

2. SAME. *Rights and liabilities of assignee.*

The assignee of a lease can, as a general rule, avoid liability for rents, other than those accruing during the term for which he holds possession, by assigning the lease and surrendering possession to some other person; and it makes no difference that such reassignment is made to a beggar, a minor, a married woman, a prisoner, an insolvent, or to one hired to take the assignment, and for the express purpose of avoiding liability for rents. (*Post*, pp. 140, 141.)

3. SAME. *Same.*

But the assignee cannot by mere abandonment of possession, without assignment of the lease, avoid liability for rents. (*Post*, p. 141.)

4. SAME. *Same.*

Nor can the assignee of a lease, that provides for payment of annual rents, avoid payment of rents for the whole year where he holds over, even if he abandons possession and assigns the lease before the expiration of the year. (*Post*, pp. 141, 142.)

Cases cited: *State v. Martin*, 14 Lea, 92; *Snowden v. Memphis Park Association*, 7 Lea, 225.

FROM SHELBY.

Appeal from Chancery Court Shelby County. F.
H. HEISKELL, Ch.

McLean v. Caldwell.

JAS. M. & C. D. M. GREER for McLean.

R. H. BOYD for Caldwell.

SNODGRASS, C. J. This suit is against the purchasers at a foreclosure sale of a leasehold interest of real property in Memphis. The complainants here are the original lessors. Their lessee was the Coliseum Company, which took of the complainants, on September 19, 1896, a written lease of the property for ten years. The first payment of agreed yearly rental (\$300) was to be made when possession was given; the next, August 1, 1898, and every subsequent payment on the first of each succeeding August. The lessee took possession under the written lease, built upon the property, and then assigned all its interest in trust to secure a note, which it failed to pay, and the property was sold to foreclose. The defendants became the purchasers, took deed of conveyance, and entered into possession, thereby becoming assignees of the leasehold, and occupying the relation of privies in estate with the original lessor. *State v. Martin*, 14 Lea, 93. They continued to occupy the premises until destroyed by fire, August 10, 1898; then they ceased to occupy, or control, them in any way. They did not, however, reassign the lease to the lessors, or any other person; nor did the lessors take any actual possession, or control, of the premises. On the following fourteenth of September, they notified the lessors they "had not had possession since August 10, 1898, and now sur-

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render the same and all right under said lease." They did not make, or tender, any formal reassignment of the lease; nor did they, then or thereafter, make one to the lessors, or any other person. The lessors refused to accept this as terminating the assignees' liability, and brought an action for rent of the term. In that suit it was held they could only recover yearly rent, and they were, therefore, allowed recovery to August 1, 1898. Defendant then tendered the amount which would be due to August 10, 1898, at which time their actual possession ceased. The lessors refused to accept it, and brought this suit for the yearly rent, due August 1, 1898, for the year ensuing. The defense made was non-liability beyond the date of actual occupancy, August 10th, and that, having paid up to August 1st, under former decree, and tendered the amount due for this ten days' additional rent, defendants were no further liable. They followed up the tender by bringing this amount into Court, with their answer. The Chancellor sustained this defense, and gave judgment only for the amount tendered, dismissing the bill. The complainant appealed and assigned errors.

As a general rule, the assignee of a lease is only liable for rents while in possession, provided he reassigns the lease to the lessor or any other person; and it does not matter that such assignment is made to a beggar, a minor, a married woman, a prisoner, or an insolvent, or to one hired to take the assignment, or made, expressly, to rid himself

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of liability. Wood on Landlord and Tenant, p. 556, sec. 349; 10 Wash. R. P., 451; *Tibbals v. Iffland*, and authorities cited; *Cong. Soc. of Sharon v. Rix et al.*, 17 At. Rep. 719.

The reason is that such reassignment and surrender of possession terminates the privity of estate existing between him and the landlord. If the assignee, to whom such second or later assignment is made, takes possession, the relation of privity in estate with the assigning assignee is transferred to him, and the assignment, with surrender or transfer of possession, ends it in the acting assignee. It, therefore, follows that the assignee can always make his liability continue only during his possession. But it does not follow that he cannot by his own acts or omissions make it extend *beyond* actual possession. If he wishes it to extend only during possession, he must reassign his lease, as well as abandon possession. See cases before cited, and see *Bonetti v. Treat*, 14 Am. Law Rep., 151, and notes.

And he can only thus escape liability for subsequent, but not for previous, breaches. Wood on Landlord and Tenant, p. 552, sec. 340.

If he omit such reassignment he continues liable. "He cannot escape liability by merely abandoning possession, however brief." Woods on Landlord and Tenant, p. 552, sec. 339.

So he may continue his liability beyond actual possession by holding over after a yearly rental is due before he assigns and abandons. When any

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rent was due, while in possession, it was his duty to pay it. Failure was a breach of his covenant. In such case he is liable for that year, and, as has been also decided, as upon implied promise to pay. *Cong. Soc. of Sharon v. Rix et al.* 17 At. Rep. (Vt.), 719.

That case was, briefly, this: The Society leased to Mosher and Barnard for 999 years, at a yearly rental of \$28.50. The covenant was to pay this rent on each 12th of March during continuance of the lease. The lessees conveyed to George Haynes, and Haynes conveyed to defendants. Defendants took possession and paid rent due to March 12, 1885. They continued in possession to June following, when *they assigned and delivered possession* to one Peoples. The 12th of March having passed before the assignment to Peoples and surrender of possession to him occurred, the complainants sued defendants for the year's rent. The defense was that they had assigned so Peoples and abandoned possession in June, and that this *assignment and discontinuance of possession* operated as a surrender of the lease to the plaintiff.

The Court held that, while surrender of possession, accompanied by assignment, would have that effect, yet as it had not occurred until after the year's rent fell due, on the 12th of March preceding, defendants were liable for the year's rent, notwithstanding such assignment and abandonment of possession. On these facts the Court held that the

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law implied a promise by defendants to pay the rent.

This is the precise condition here. The rent in this case was due on the 1st of August. Defendants held over to the 10th, and thereby became liable for the whole year's rent, and this would be true even had there been a reassignment here, as there was there, after the rent obligation for the year matured. Defendant's counsel rely on this case as holding that mere abandonment of possession is sufficient to release an assignee and one of the headnotes seems to bear out this contention, and so of one expression in the opinion. But, on looking to the opinion, it appears that it was the purpose of the Court to declare that as law in that case, *because there had been an assignment of the lease*, and it appears from the statement of the Court that it was not even the argument of the defendant's counsel that *mere abandonment of possession* operated as a discontinuance of liability, but that it did so *because of the assignment* to Peoples. The general statement of the Court is entirely true as applied to the facts to which alone it is speaking.

The failure of the reporter to limit it to the precise facts is the only reason for assuming that it so decided. As we have seen, the Court did not *decide* that the abandonment and assignment together released defendants under the facts, but held them for the year, because both these occurred after the

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date when one year's rent fell due, although the occupancy of defendants had not been for the whole of that year. It is argued, however, that the Martin case, before referred to (14 Lea, 92), decided that the assignee was liable *only* during his possession. The statement in that case was that "a purchaser under a foreclosure of a mortgage or trust of the leasehold estate is an assignee of the lease, and liable accordingly during his possession of the demised premises," citing *Post v. Kearney*, 2 N. Y., 394. This is undoubtedly true, and is not open to controversy here or elsewhere. But it was not said in that case, or any other, that he was liable for rents *only* during his possession, and that case decides that Caruthers, who had been in possession on January 10, 1880, when taxes for that year became due, was liable therefor, notwithstanding he had given up possession and *assigned to Shields* in November, 1880, and, of course, before the close of the year. The taxes being due January 10, 1880, his later abandonment of possession and *assignment* did not relieve him from a prior charge. It is, therefore, direct authority against the contention of defendants, because they became liable for rents August 1, 1898, and in no event yielded possession before August 10, 1898.

Again, it is argued that the case of *Snowden v. The Memphis Park Association*, 7 Lea, 225, decides that an assignee may, without more, abandon possession and be relieved from liability for rents. That

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case does decide that a purchaser of a leasehold interest, who disclaims it and *never* takes possession, is not liable—not that one who has purchased and taken possession can escape liability by merely abandoning possession, without more. The language of the Court is as follows: “But the complainant has also appealed, and insists that the Chancellor erred in refusing to hold Zent liable, as purchaser of the lease, for all rents and taxes that accrued after that date. We are of opinion, however, that said defendant may be permitted to disclaim all interest under his purchase. His answer denies that he took possession of the leased premises, or set up any claim thereunder, and there is no proof to overturn his answer; on the contrary, it was admitted that he would testify in support of his answer, and that this might be taken as his testimony.” (P. 231.)

This being true, no privity of estate was ever established between the purchaser of the leasehold and the original lessor, for it requires both a purchase of the lease and possession thereunder to establish such privity. But, when the purchase is once made and possession taken, the relation is established, and no case can be found showing it ever dissevered, except by reassignment to some one, and abandonment of the possession. The reason why this works disseverance is because: first, if the assignment is to the lessor, it restores to him the assignee's right; second, if to another who takes

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possession, it puts the last assignee, instead of his assignor, in privity with the landlord; and, third, if to any assignee who does not take possession, it ends the privity of the assigning assignee, and, if the last assignee does not take possession, no other privity is established, and the whole interest reverts to the lessor. But it is said that this last result follows on mere abandonment, and we are cited to cases holding that, upon abandonment of possession at the end of a lessee's term, or during his term, the right of entry and possession is in the *lessor* from the moment of abandonment, whether he knows of it or not. *Frank v. Nichols*, 6 Mo., 42; *May v. Lockett*, 48 Mo., 472.

This is true, but is beside the question here. That the lessor has the *right* of entry is not disputed, and that no third person can deprive him of it, not even a purchaser *in invitum*, is not disputed, but such an abandonment during the term does not release the lessee, nor work a surrender of the premises unless it is assented to by the lessor, and such acceptance must be shown by words or acts. Tiedeman on Real Property, Sec. 198, and notes.

It must be remembered that we are not dealing with the question whether on abandonment by a lessee, or his assignee, the original lessor has not and may not exercise the right of entry and assert his claim to possession against anybody. We are dealing only with the question of how an assignee

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of a lease, who has taken possession, may divest himself of liability. That he cannot do so by mere abandonment seems nowhere to be disputed.

We have stated that, in this case, the assignees had made no formal reassignment of the lease. Whether their letter of September 14 should be treated as equivalent, it is not necessary now to decide, inasmuch as if it were, being sent after the liability had accrued, on August 1, 1898, it is immaterial.

The decree of the Chancellor is reversed and decree rendered here in favor of complainants for \$300, interest and cost.

Kittrell v. Perry Lumber Co.

KITTRELL v. PERRY LUMBER CO.

(*Jackson.* May 18, 1901.)

GARNISHMENT. *Insufficient notice.*

Notice of garnishment is insufficient to require appearance and answer by a corporation, which is addressed to an individual, naming him as agent of the corporation, and only requiring him personally to answer as to the debtors' assets in his hands.

FROM PERRY.

Appeal in error from Circuit Court of Perry County. LEVI S. WOODS, J.

SLOAN & GREER for Kittrell.

McCALL & LANCASTER for Lumber Co.

WILKES, J. The question presented in this case is, whether the Court acquired jurisdiction of the Perry Lumber Company by the service of a garnishment notice in an attachment proceeding. This garnishment proceeding was intended to be against the Creelman Lumber Company, and to have that company answer and disclose property of the Perry Lumber Company in its hands, or under its control.

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The garnishment notice is in the following words :

“Mr. Chas. M. Bates, Agent for F. E. Creelman Lumber Company :

“By virtue of an attachment in my hands in favor of J. M. Kittrell and Webb and Wall against the estate of the Perry Lumber Company, I attach all the property, choses in action, and effects of every kind in your hands belonging to the said Perry Lumber Company, and all debts you or your firm owe them. And I notify you to appear at the next term of the Circuit Court of Perry County, to begin on the first Monday in December, 1898, in the town of Linden, to answer on oath such questions as may be asked you touching the property and effects of the said Perry Lumber Company, and to retain possession of all their property that now is, or may hereafter, come into your custody, or under your control, to answer this garnishment. This August 20, 1898.

“W. T. DOBBS, *Deputy Sheriff.*

“[INDORSED.]

“Executed by reading to and leaving a true copy with Charles M. Bates, agent, August 20, 1898.”

It is evident that this notice is not to the Creelman Lumber Company, but to Charles M. Bates. The designation of Mr. Bates as agent for the Creelman Lumber Company is a mere *description personal*. The company is not obligated by this notice to make an appearance and answer. It will be noted that

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the notice does not require Mr. Bates, in express terms to, disclose whether the Creelman Company has any property of the Perry Lumber Company, but only to make disclosure as to himself. We think that the Court acquired no jurisdiction of the Creelman Lumber Company, or the Perry Lumber Company, by this notice and its service, and all steps taken thereafter were unauthorized and void as to the companies.

There are other matters raised in the case which we deem unimportant, as the present question is controlling, and its decision is conclusive.

The judgment of the Court below is affirmed, with costs.

Tennessee Ice Co. v. Raine.

TENNESSEE ICE CO. v. RAINE.

(Jackson. May 18, 1901.)

1. CORPORATIONS. *Charter powers.*

A corporation having the charter of an ice company has no authority to engage in the business of buying and selling beer, and its acts in the latter capacity are *ultra vires*. (Post, p. 154.)

2. SAME. *Liability for ultra vires acts.*

A corporation that has received and retains the benefit of an executed contract that it had no power under its charter to make, will not be heard to say that its act was *ultra vires* in order to defeat an action by the other party to recover what is justly due upon an equitable adjustment between the parties. (Post, pp. 154-160.)

Cases cited: Hawkins Co. v. Railroad, 1 Shann., 297; Marble Co. v. Harvey, 92 Tenn., 121.

3. CHANCERY PLEADING AND PRACTICE. *Bill may embrace double aspect and seek alternative relief when.*

A bill in equity is not bad for duplicity, by which the complainant seeks to recover against a corporation on its contract if valid, or in the alternative upon the value of the consideration paid, if the contract should be held *ultra vires* and void. (Post, pp. 153-155.)

Cases cited: Merriam v. Lacefield, 4 Heis., 218; Dodd v. Benthall, 4 Heis., 609; Marble Co. v. Harvey, 92 Tenn., 121; Hill v. Harri-man, 95 Tenn., 308; Collins v. Knight. 3 Tenn., Ch. 188.

4. SAME. *Prayer for relief.*

Where a general prayer is added to a special prayer for relief, such relief may be granted as is justified by the averments of the bill, even though it be different from that primarily and specially asked for.

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Cases cited: Ross v. Young, 5 Sneed, 630; Hoyal v. Bryson, 6 Heis., 141; O'Connor v. Hotel Co., 93 Tenn., 708.

FROM MADISON.

Appeal from Chancery Court of Madison County.
A. G. HAWKINS, J.

HAYS & BIGGS for Bank.

R. F. SPRAGINS for Brewing Co.

WILKES, J. The original bill in this case was filed to wind up the Tennessee Ice Company as an insolvent corporation. It was filed by its manager and secretary on behalf of himself and all creditors and stockholders. The company was incorporated in 1890, and its charter is made part of the record. Answers were filed by some of the parties named as defendants, and there was an order to the Clerk and Master to report its indebtedness. Under this order, the Joseph Schlitz Brewing Company, a foreign corporation, filed a balance of account, for beer sold the company, amounting to \$453.40. It also filed a petition in the insolvency proceeding, setting out that beer was sold to the company, to the amount of \$1,853.52, which was all disposed of by the company, and proceeds received by it and appro-

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priated to its uses and benefit, and that all but \$453.40 of the proceeds had been paid the brewing company, and that it refused to pay this sum, upon the ground that the contract made by the company was *ultra vires* and not warranted by any authority in its charter.

The petition prays that its claims be allowed against the corporation; but that, if that relief cannot be granted because of the objection made, or for any other reason, then, that petitioner be allowed to disaffirm the contract and recover for so much goods as had not been paid for, to wit, the sum of \$453.40; that it have relief, as upon an account, for a balance of money had and received, or as for a conversion, and for such other and further and general relief as it might be entitled to under the premises.

The petition was demurred to upon three grounds by the Second National Bank, as a creditor.

1. That the account was for beer sold and delivered, and it did not appear that the ice company was by its charter empowered and authorized to deal in beer.

2. That the sale of the beer to the company for purposes of resale was an act *ultra vires* the charter, and that the business of cold storage, which the company was authorized to carry on, did not give it the power to buy and sell beer, and its attempt to do so was beyond its power and its contract void, and no recovery could be had thereon.

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This demurrer was sustained, the claims disallowed, and petitioner has appealed to this Court and assigned errors.

We are of opinion there is error in the decree and action of the Chancellor in the Court below. Granting that the ice company had no right to buy and sell beer under its charter, which is not seriously questioned, and which, we think, admits of no doubt, the fact remains that it has received from the petitioner goods to the value of \$453.40, which it has sold and converted to its own use, and for which it refuses to account. While the petitioner may not recover upon the contract, as in affirmance of the same, it has the right to disaffirm such contract and sue for the proceeds of its property, which the ice company, under the guise of a contract, has received, and which it seeks to repudiate without accounting for the benefits received.

The contract is an executed one, so far as the petitioner is concerned, the property of the brewing company has been received and appropriated, and the ice company has the benefit.

The petition is in the alternative that a recovery be had in affirmance of a sale, but if this cannot be done over the objection of the ice company, then that petitioner be allowed to disaffirm the contract and sue for the proceeds of the goods sold and not paid for, on the idea of a *quantum valebat*, or of money had and received, or consideration retained, upon a void sale.

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A bill may pray for alternative relief, provided the prayer is consistent with the facts stated in the bill, when the complainant cannot foresee the result of his suit, or when the bill has a double aspect. Gibson's Suits in Chancery, Sec. 183; *Collins v. Knight*, 3 Tenn., Ch., 188; *Merriman v. Lacefield* 4 Heis., 218; *Dodd v. Benthall*, 4 Heis., 609; *James v. Kennedy*, 10 Heis., 604; *Marble Co. v. Harvey*, 92 Tenn., 121; *Hill v. Harriman*, 95 Tenn., 308; 1 Pomeroy's Equity Juris., p. 246.

And when there is a prayer for special and general relief, such relief may be granted as is justified by the averments of the bill, even though it be different from that primarily or specially asked for. *Ross v. Young*, 5 Sneed, 630; *Hoyal v. Bryson*, 6 Heis., 141; *O'Conner v. Hotel Co.*, 93 Tenn., 708.

There is no objection in the demurrer in this case that alternative prayers are made in the petition, and the demurer as filed does not go to the entire petition and relief asked, but only to that feature of it which seeks an enforcement of the contract, and not to the alternative feature that seeks a rescission and refunding. If there was an antagonism in the relief asked it would be waived by the failure to object, but under the facts there is no real antagonism. Counsel for the bank has cited a large number of authorities to sustain their contention that the Courts will not enforce the *ultra vires* contracts of corporations, and this is undoubtedly true when the

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contracts are executory and the attempt is simply to enforce; but when the contract has been executed on the one hand, and on the other the party has secured benefits for which it refuses to account, the rule is different, and upon the repudiation of the contract by the party who has received the benefit, the opposing party may sue to recover the proceeds withheld. The petition in this case may, therefore, under the facts and prayer, be treated as one disaffirming a void executed contract and seeking to recover back the consideration paid thereon.

In *Holt v. Winfield Bank*, 25 Fed. Rep., 312, the Court, speaking through Mr. Justice Brewer, said: "It may be considered as settled law to-day that when a corporation goes outside of its legitimate business and makes a contract, and that contract is executed and the corporation has received the benefits of the contract, the Courts will never listen to a plea of *ultra vires*."

In *Salt Lake City v. Hollister*, 118 U. S., 263, it is said that in cases of *ultra vires* contracts, upon which corporations could not be sued, "the courts have gone a long way to enable parties who had parted with money and property on the faith of such a contract, to obtain justice by recovery of the property, or the money specifically or as money had and received, to the plaintiff's use. See, also, *Hitchcock v. Galveston*, 96 U. S., 340-350; *Chapman v. Douglass*, 107 U. S., 348-355; *Parkersburg v. Brown*, 106 U. S., 487-503.

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In *Pullman Car Co. v. Central Trans. Co.*, 171 U. S., 138, the Court refused to enforce specific performance of an *ultra vires* contract, which was void also as against public policy, the Court nevertheless permitted the recovery of the consideration paid. It said: "The property must, therefore, be returned or paid for. The former is impossible. The property has substantially disappeared. It has become incorporated with the business and property of the plaintiff, and cannot be separated. Compensation must be made therefor." *Pullman Car Co. v. Cent. Trans. Co.*, 171 U. S., 152. See, also, *Denver Fire Ins. Co. v. McClellan*, 9 Colo., 135; same case, 59 Am. Rep., 135.

In this case Justice Stone says, for the Court, in substance: "The public has more interest in compelling a corporation to account for benefits received than it has in the protection of innocent stockholders and creditors. We are not able to see why the fact of insolvency should prevent the operation of the rule. If the corporation has received values the same have enured to the benefit of stockholders and creditors, whether the concern is going or insolvent.

It may be a reason why the petitioner may not recover his full claim, but only a *pro rata*, but it is not a reason why he should not share in the assets with other creditors. In the case of *Hawkins Co. v. The R. R.*, 1 Shann., 297, it is said: "If a party proceeds in the performance of a con-

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tract, expending his money and labor in the production of values which the corporation appropriates, we can never hold the corporation excused from payment or performance on the plea that the contract was *ultra vires*."

There is a uniformity in the decisions that either party to an *ultra vires* contract, while retaining the benefits, is estopped to plead that the contract was *ultra vires* in order to defeat recovery. But they are not agreed as to the remedy in such cases.

One class of cases holds that the party against whom recovery is sought is estopped to deny the contract and permit recovery on the contract itself, and, perhaps, the weight of authority is in favor of this view. Elliott on Private Corporations, Sec. 218; 2 Beach on Private Corporations, 423, 425, 433, citing a large number of authorities. It appears that sixteen or more States have adopted this rule, which is tersely stated in *Seymore v. Guaranty Asso., etc.*, 54 Minn., 147, as follows: "There are few rules better settled or more strongly supported by authority, with fewer exceptions, in this country than that when a contract by a private corporation, which is otherwise unobjectionable, has been performed on one side the party who has received and retained the benefits of such performance, shall not be permitted to evade performance on the ground that the contract was in excess of the (power) purposes for which the company was created.

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Another class of cases holds that when one party to an *ultra vires* contract has rendered service or parted with values for the benefit of another, although he cannot recover upon the contract itself, he may disclaim the contract and sue upon a *quantum meruit* or *quantum valebat*. 2 Beach on Private Corporation, Secs. 423, 433, note 3, p. 714; *Pittsburg v. Bridge Co.*, 131 U. S., 389.

Our own Court seems to have granted relief upon each theory—on the first: *Hawkins Co. v. Railroad*, 1 Shannon, 297; on the second: *Marble Co. v. Harvey*, 92 Tenn., 121 (S. C., 20 L. R. A., 765, and notes). See also: Elliott on Private Corporation, Secs. 206, 209; *Pittsburg R. R. Co. v. Keokuk*, 131 U. S., 371; *Greenville Co. v. Planters Co.*, 70 Miss., 669; *Garrett v. Kansas City Co.*, 113 Mo., 330; *Bank v. Townsend*, 139 U. S., 67. The Mississippi case cited *supra*, seems to recognize the existence and propriety of both remedies. *Greenville Co. v. Planters Co.*, 70 Miss., 669.

In *Central Trans. Co. v. Pullman Co.*, 139 U. S., 60, the Supreme Court of the United States says :

“The Courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as it could consistently be done with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made therefor.”

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“In such case, however, the action is not maintained on the unlawful contract nor according to its terms, but on an implied contract to return or failing to do that, to make compensation for property or money which it has no right to retain.”

We are of opinion, it is not material whether the action be for money had and received, or for consideration paid and withheld on a void contract sought to be rescinded, the substance of the right is to recover back money, which, in equity and good conscience, belongs to petitioner and is unjustly withheld from him by defendant.

The decree of the Chancellor is reversed and the petitioner will be allowed to file and prove his claim and share *pro rata* in the assets of the Ice Company, and the bank will pay the costs of the petition in this Court and Court below.

Neilson v. Weber.

NEILSON v. WEBER.

*(Jackson. May 18, 1901.)*1. ADMINISTRATION. *Decedent's land sold by heir not liable for debts.*

The sale by an heir of inherited lands to a *bona fide* purchaser for value, who has paid for same in full before receiving notice of any indebtedness of the ancestor's estate, for payment of which the lands might have been sold, places the lands beyond the reach of creditors of the estate, and substitutes the personal liability of the heir for the lands. (*Post*, pp. 163, 164.)

Code construed: § 3989 (S); § 3094 (M. & V.); § 2256 (T. & S.).

Cases cited and approved: *Livingston v. Noe*, 1 Lea, 65; *Smith v. Thomas*, 14 Lea, 325; *Maxwell v. Smith*, 86 Tenn., 540; *Raht v. Meek*, 89 Tenn., 276.

2. SAME. *Same. Burden of proof.*

But the burden is upon the purchaser, in such case, to show that he made the purchase from the heir *bona fide*, and without notice of indebtedness of the ancestor's estate, which might have been made a charge against the lands. (*Post*, p. 164.)

Cases cited and approved: *Gibson v. Jones*, 13 Lea, 692; *Raht v. Meek*, 89 Tenn., 276.

3. SAME. *Notice of debts to purchaser from heir insufficient, when.*

Suggestion of insolvency made on the day after administration, which had not been followed up by any subsequent step, when the heir sold his interest in the lands of the estate, fifteen months later, does not affect the purchaser from the heir with constructive notice of indebtedness of the estate for which the lands might be held liable. (*Post*, p. 165.)

4. SAME. *Same.*

The purchaser of lands from the heir, if otherwise innocent, will not be affected by the fact that his attorney knew of the indebtedness of the estate, especially where it does not appear

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that the attorney had this knowledge at the date of the purchase, or that he acquired it in the course of his employment. (*Post*, p. 165.)

FROM SHELBY.

Appeal from Probate Court of Shelby County.
J. S. GALLOWAY, J.

EDGINGTON & EDGINGTON for Neilson.

W. W. GOODWIN for Weber.

WILKES, J. This is a bill to have the rights of parties declared, and to sell land for partition. The land originally belonged to Wilhelmina Weber, who died March 18, 1896, intestate, leaving as her heirs three children, Rudolph Erlick, Adolph Weber, and Emma Heiss. Her personal estate was insolvent. Adolph Weber was appointed Administrator on March 26, 1896, and on the next day suggested the insolvency of the estate. He took no further steps in the administration until July 2, 1897, when he filed a statement of the assets and liabilities of the estate, and on December 22nd he filed a supplemental statement and report. The first statement is not in the record, and we do not know what it contained, and the second only shows that the Administrator had sold the personal assets of the estate for \$20.00, and that was all there was of the per-

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sonalty. In the meantime, and on the fourth of June, 1897, before the first report was filed, Rudolph Erlick sold his interest in the real estate to complainant, Christine Neilson, for \$225.00, as shown by the deed made to him on that date, the same being a deed with covenants of warranty and against encumbrances.

Neilson testifies that he was told by Erlick that his mother's estate was not indebted, and that there was no encumbrance on the land. He states that his attorney told him that Adolph Weber pretended to put up some false claims, and, upon further examination, that this latter information came to him after he had bought this interest. It appears that these claims were disallowed, as well as some others, and that the valid claims allowed against the estate amounted to \$244.71

A bill to sell the lands to pay debts was filed July 12, 1898, or more than a year after Neilson bought the interest of Rudolph Erlick and paid him for it, and more than two years after the estate had been suggested to be insolvent.

The insistence is that under the statute, Shannon, § 3989, the title of complainant is good, and that the interest sold to him cannot, under the facts recited in the record, be subjected to the debts of the estate, and that he occupies the status of an innocent purchaser. The statute referred to is in these words: "If an heir or devisee alien the land before action brought or process sued out, he shall

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be answerable for the ancestor's debts to the value of the lands aliened."

Under this statute it has been held that the heir or devisee is so far owner that he is entitled to the rents and profits until the land is sold to pay the ancestor's debts, and if, before any proceeding for that purpose is instituted, he sells the same to a *bona fide* purchaser, such purchaser gets a good title, and the creditor's remedy is against the heir or devisee, who is answerable for his proportionate share of such of the ancestor's indebtedness as the personalty was insufficient to pay to the value of the land so aliened. *Livingston v. Noe*, 1 Lea, 65; *Smith v. Thomas*, 14 Lea, 325; *Maxwell v. Smith*, 2 Pick., 540; *Raht v. Meek*, 5 Pick., 540. But the burden in such case is on the purchaser to show that his purchase was *bona fide*, which could not be the case if he purchased with notice of debts due from the ancestor that might be made a charge against the lands in the hands of the heir or devisee by any proceeding known to our law. *Gibson v. Jones*, 13 Lea, 692; *Raht v. Meek*, 5 Pick., 276.

In the present case the testimony of the purchaser is that he knew nothing of any debts against the estate when he bought, and was assured by his vendor, one of the heirs, that there were no such debts. There is really no evidence to the contrary. While there may appear to be a little contradiction in the answer and deposition of Neilson, it is more apparent than real, and a fair statement of his evi-

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dence and contention is, that at the time he bought, he had no notice of any debts against the estate, but learned of claims being made afterwards, that were never sustained. It is true that there was a suggestion of insolvency made in the County Court on the day after the administration was taken out, but it was not followed up by any proceedings to subject lands, nor was there, in fact, any statement of assets, or liabilities, until after Neilson had made his purchase. It is not shown that Neilson had any actual notice of this suggestion, and if it be held that he had constructive notice, still the fact remained that the suggestion of insolvency was not followed by any other steps or proceedings for fifteen months thereafter, and the suggestion of insolvency, in a large number of cases, is merely a precautionary measure.

It is said that Neilson is affected with notice by the fact that his attorney knew of debts against the estate, but this position is not tenable, for two reasons. In the first place it is not shown that the attorney had the notice at the time of Neilson's purchase, and, besides, a client is not affected with notice, because his attorney may know facts which he has obtained from outside sources, and not in the matter and course of his employment for such client. *Kirklin v. Atlas Sav. Asso.*, 60 S. W., 149.

There is no error in the decree of the Court below, and it is affirmed, with costs.

Swope v. Jordan.

SWOPE v. JORDAN.

*(Jackson. May 24, 1891.)*1. TAX TITLE. *Void. when.*

Under the facts stated in the opinion the Court holds that complainant acquired no title to the lands involved by his purchase thereof at a tax sale. (*Post*, pp. 169-171.)

2. ESTOPPEL. *By recitals in deed or mortgage.*

Recital in a mortgage of the existence of a former unpaid mortgage on the same property, estops the parties to the later mortgage and those claiming under them, to deny the legality and priority of the earlier mortgage. (*Post*, pp. 172, 173.)

Cases cited and approved: Coal Creek Mining Co. v. Heck, 15 Lea, 497; McRoberts v. Copeland, 85 Tenn., 211; Caraway v. Caraway, 7 Cold., 245; Rankin v. Warner, 2 Lea, 302.

3. CORPORATIONS. *Constitutionality of Acts 1895 reaffirmed.*

Constitutionality of Acts 1895, Ch. 119, validating contracts of foreign corporations made before registration of charter and abstracts thereof, reaffirmed. (*Post*, pp. 177-179.)

Acts construed: Acts 1895, Ch. 119.

Case cited and approved: Butler v. B. & L. Asso., 97 Tenn., 679.

4. SAME. *Same.*

But said Act can have operation and effect, within constitutional limitations only between the original parties, or those claiming under them, without superior equities. It cannot operate to divest the vested rights of innocent third persons. (*Post*, pp. 179-183.)

Case cited: Shields v. Clifton Hill Land Co., 94 Tenn., 123.

5. INNOCENT PURCHASER. *Who is not.*

The holder of notes secured by mortgage, who took them in payment of a pre-existing debt, and with notice that the mortgage securing them recognized on its face a pre-existing unpaid mortgage on the same property, is not such innocent

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purchaser, and does not occupy such position that he may set up the defense that the former mortgage was void because made to a foreign corporation that had not complied with the statute requiring registration of its charter (*Post*, pp. 169-177, 182, 183.)

6. BUILDING AND LOAN ASSOCIATIONS. *Accounting with borrowing stockholder.*

Where a building and loan association declares forfeiture against its defaulting borrowing stockholder, and subsequently, becomes insolvent itself, the account between the company and such stockholder should be stated, in winding up its affairs, as of date of the forfeiture, and as between a going, not an insolvent, concern and such stockholder. (*Post*, pp. 183, 184.)

Cases cited: *Rogers v. Hargo*, 92 Tenn., 35; *Post v. B. & L. Asso.*, 97 Tenn., 408; *Carpenter v. Richardson*, 101 Tenn., 176; *Carpenter v. Frazier*, 102 Tenn., 462.

FROM SHELBY.

Appeal in error from Chancery Court of Shelby County, F. H. HEISKELL, Ch.

ST. JOHN WADDELL, W. W. GOODWIN and J. M. STEEN for Swope.

MYERS & BANKS and PRESCOTT & FARMER for Jordan.

WILKES, J. October 1, 1889, M. M. Gilchrist subscribed for twelve shares of stock in the Interstate Building and Loan Association of Bloomington, Illinois, each share being for one hundred dollars. June

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1, 1889, he borrowed from the Association \$1,200, and secured the same by mortgage on real estate, the amount to be paid, under the rules and by-laws of the Association, in monthly installments. The Association paid over the entire sum of \$1,200, and the premium bid was to be paid in monthly installments. May 25, 1892, Gilchrist and wife conveyed the property to Robert Thompson, by deed, for the consideration of \$2,500; \$20 of the amount was paid in cash, and for the remainder one hundred and eleven notes were executed, payable monthly. A mortgage back to Butler Jack, trustee, was executed by Thompson and wife, with power of sale in default of payment of the purchase money.

The deed or instrument contains this clause: "That the same (premises) are free from all incumbrances except a trust deed to the Interstate Building & Loan Association of Bloomington, Illinois, which M. M. Gilchrist assumes to pay." This is signed by Gilchrist and wife and Thompson and wife.

On July 11, 1894, Gilchrist assigned to W. C. Swope, before their maturity, the purchase money notes for the lots, in satisfaction of a debt he had been compelled to pay for him as endorser. Gilchrist having defaulted on payment of his dues to the Association, his stock was declared forfeited, and Jordan, its trustee, advertised to sell the lots under the trust deed. Complainant enjoined the sale, which injunction continued in force until final decree in this cause.

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There was a demurrer to the bill, which was overruled with leave to rely on the same in the answer, which was done. January 28, 1897, a decree was entered appointing a receiver.

June 1, 1896, the Association having become insolvent, was placed in the hands of a receiver by a court in Illinois.

On June 21, 1898, a general creditors' bill was filed in the Chancery Court at Memphis against the Association and was sustained. The Association was adjudged insolvent, and Edward Barry was appointed receiver, being the same person theretofore appointed in the suit in Illinois. He filed an answer and cross bill in this cause, and prayed for a foreclosure of the mortgage to the Association, claiming as due, under the rules and by-laws, up to January 1, 1897, the sum of \$1,440.50.

Pending the suit, and injunction which Swope had sued out on September 24, 1896, he, Swope, purchased the lots at tax sale, from a back-tax attorney, and claims, under this tax sale, a title paramount.

The trustee of Shelby County sold the property, presumably, for the taxes of 1896 also, and reported the same to the Clerk of the Circuit Court. On September 13, 1899, the receiver redeemed the property from this sale, and took deed and certificate therefor and set up these facts by cross bill.

The cause was heard on the entire record March 29, 1891, and the Chancellor decreed that the trust

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deed of Gilchrist and wife to the trustee of the Association was prior in date and equity to the trust deed of Robt. Thompson and wife to Butler Jack, trustee, of date May 25, 1892, and decreed the foreclosure of said deed of June 1, 1891, subordinating to it any lien in the said deed of May 25, 1892, and decreeing a sale of the property and subjecting the funds in the hands of the receiver, and the proceeds of the Gilchrist stock in the said Association to the payment of any indebtedness found due thereon, and referred the cause to the Clerk and Master to take an account of said indebtedness to be taken, according to the rule laid down by this Court in *Rogers v. Hargo*, and other cases. From which decree the complainant has appealed to this Court and assigned errors.

I. The first assignment of error by appellant W. C. Swope is that the Court erred in refusing relief to him under his supplemental bill, because of his so-called tax purchase of the property in litigation, from A. J. Harris, back tax attorney. In regard to this, the facts are as follows, in addition to what has already been stated:

The back tax attorney deed to Swope was executed Nov. 18, 1898. It is quite meagre and informal. It does not show the year for which the taxes were delinquent and property was sold. It does not show the amount of taxes nor the penalty nor interest, nor whether the sale was public or private. Swope, the purchaser, was holding under

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Gilchrist's assignment of the notes to him for a pre-existing debt, and had full knowledge of the priority of the Association mortgage on the property, and of Gilchrist's stipulation to pay the dues to the Association, and his implied and express duty and stipulation in the trust deed to the Association to keep down the taxes. He procured the sale of the property to be enjoined for defaults in these payments, and during the pendency of that injunction bought the property at the tax sale. If it was not the direct duty of Swope, the assignee of the notes and mortgage, to keep down the taxes, he would not be allowed to invoke the injunctive power of the Court to hold off defendants with the one hand, and on the other hand buy in property at tax sale and claim the same by paramount title. It does not clearly appear whether the sale made by the County Trustee was for the same taxes as those for which the back tax attorney made sale, but the inference is that it was. Barry, the receiver, redeemed this sale, and set up the rights acquired thereunder by crossbill. We do not think complainant can take anything under this tax purchase.

The second error assigned is to the decree of the Court in holding that the Trust Deed from M. M. Gilchrist and wife to B. M. Stratton, trustee, of date June 1, 1891, to secure the Interstate Building & Loan Association, of Bloomington, Illinois, in the payment of \$1,200 borrowed money, was entitled to priority of satisfaction of payment over the deed of

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Robt. Thompson and wife to Butler Jack, trustee, to secure M. M. Gilchrist in the payment of three notes secured by exhibit B. in bill.

The third assignment of error by complainant is to the decree of the Chancellor "in declaring a charge upon 'the lots of land in favor of the Interstate Building & Loan Association under the Trust Deed executed by Gilchrist and wife to B. M. Stratton, trustee, over the title of Robt. Thompson, and the notes executed by him to M. M. Gilchrist, and secured by trust deed of Thompson to Butler Jack, trustee, which last named notes are now held by complainant, Swope.'" The above two assignments cover practically the same proposition, and, for convenience, we consider them together.

The deed and mortgage between Gilchrist and Thompson contains the clause before recited: "That the same (premises) are free from all encumbrances, except a trust deed to the Interstate Building & Loan Association of Bloomington, Illinois, which M. M. Gilchrist assumes to pay." This must operate as an estoppel upon Thompson and Swope, the assignee, to question the legality and priority of the mortgage to the Association. They are both affected with notice and cannot claim except in subordination to that mortgage, as neither occupies the status of an innocent purchaser. 1 Jones on Mortgages, Secs. 735-736 (5th Ed.), and notes, Sec. 544, p. 695; 2 Pomeroy's Eq., Sec. 937, p. 453; 3 Pomeroy's Eq., Sec. 1205, notes; *Johnson v. Thompson*, 129

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Mass., p. 398; *Canfield v. Sheon*, 49 Mich., 313–315 Am. and Eng. Enc. of Law, p. 835; *Coal Creek Mining Co. v. Heck*, 15 Lea., 497, 506, 515; *McRoberts v. Copeland*, 1 Pickle, 211; *Caraway v. Caraway*, 7 Cold., 245; *Rankin v. Warner*, 2 Lea, 302–305; *Kilpatrick v. Haley*, 66 Fed. Rep., pp. 133, 135, 136.

In Jones on Mortgages, *Supra*, Sec. 736, the author says: “When one purchases land expressly subject to a mortgage, the land conveyed is as effectually charged with the encumbrance of the mortgage debt as if the purchaser had expressly assumed to secure it. The conveyance of land subject to a mortgage operates to give priority to the mortgage, against the purchaser, and those claiming liens under judgments subsequently rendered. The amount of the existing mortgage having been deducted from the purchase money of the incumbered property, the grantee, in effect, undertakes to pay the amount of the purchase money, represented by the mortgage, to the holder of it, and he is as effectually estopped to deny its validity as he would be had he, in the premises, agreed to pay such mortgage. The difference between the purchaser’s assuming the payment of the mortgage and simply buying subject to the mortgage, is simply that in the one case he makes himself personally liable for the payment of the debt, and in the other case he does not assume such liability. In both cases he takes the land charged with the payment of the

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debt, but he is not allowed to set up any defense to its validity, as, for instance, that the mortgage is void wholly, or in part, on account of usury."

In 2 Pomeroy's Equity, Sec. 937, *supra*, in regard to this proposition, the author says: "For the same reason the subsequent mortgagee and encumbrancer cannot defeat the prior encumbrance or procure it to be set aside upon an allegation of its usurious character."

In 3 Pomeroy's Equity, Sec. 1205, *supra*, on the point under consideration the author says: "Where the mortgagor conveys by deed absolutely silent with respect to the outstanding mortgage, the grantee, of course, takes the land encumbered by the mortgage, if he has actual notice of it, or constructive notice by record or otherwise. Where the mortgagor conveys by a deed which states simply that the conveyance is subject to a certain specified mortgage, or words to that effect, the grantee takes the land burdened with the lien."

The case of *Johnson v. Thompson*, 129 Mass., *supra*, is a well considered case, and also directly in point in its facts, in which the Court says: "It is a settled principle of law that the grantee is estopped to deny the validity of any mortgage to which his deed recites that the conveyance to him is subject." Citing various authorities.

The case of *Canfield v. Sheom*, 49 Mich., 313, *supra*, is a well reasoned case and also directly in point, upon the question under consideration; the

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syllabus is as follows: "Where the purchaser buys mortgaged premises from the mortgagor subject to the mortgage, and his deed is expressly made subject to it, though it does not in terms bind him to pay it, he is to be treated, as between himself and the mortgagor, as having assumed the mortgage, and and is personally liable for whatever deficiencies there may be after foreclosure sale." *Sweetser v. Jones*, 35 Vermont, *supra* (82 Am. Dec., p. 639), is a well reasoned case, and fully sustains the text writers upon this point.

The same doctrine prevails in Tennessee. In *Coal Creek Mining Co. v. Heck*, 15 Lea, *supra*, the estoppel was enforced although the grantees did not sign the deed (in case at bar the instrument was signed by both grantees and grantors). In the Coal Creek case the Court held that the Coal Creek Mining Co. "in accepting the deed with the reservations in it, estopped all these parties from asserting any adverse title," and that the effect of the exception or reservation under this view is held by all the authors to be that the same consequence attached to such acceptance as would have attached had it been a grant, although the Coal Creek Mining Co., the grantee, had not signed the conveyance.

In *Caraway v. Caraway*, 7 Cold., pp. 248-250, *supra*, the Court held, "that Caraway and wife, the grantees, although they did not sign the deed, were bound by its stipulations and reservations to the

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same extent as though they had signed it, having accepted the same with the reservations therein.”

In *McRoberts v. Copeland*, 1 Pickle, 211, *supra*, the same question came under consideration of this Court, where the grantees had not signed the instrument, the “habendum” of the deed in that case is in these words: “To have and to hold the above described property, to the same, Didama and Victoria McRoberts, their heirs and assignees forever, subject alone to our life estate and at our death the title to vest in fee simple in the said Didama and Victoria, their heirs and assigns.” And the Court says: “The exception or reservation in the deed operates as a conveyance of the land to his widow for life.”

In *Rankin v. Warner*, 2 Lea, 301, *supra*, the deed recited that one of the heirs was insane, and the grantees only took such title as the other heirs were able to convey, and the Court, as to this, held that the grantees in said deed, by accepting the same, were estopped, and used the following language: “They are estopped by this recital; by it the insanity is shown to exist; it continues to exist in contemplation of law until the contrary is shown, with the burden of so showing resting upon the plaintiffs in error.”

In the case at bar the reservation is in the face of the deed as to the mortgage of the Interstate Building & Loan Association, etc. That debt having been shown in the instrument to exist, it is

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presumed to continue until clearly shown that it has been paid off. Robert Thompson and complainant (Swope) hold under that deed, and are estopped to deny the validity of it.

The case of *Kilpatrick v. Haley*; 66 Fed. Rep., p. 133, *supra*, is a very full and instructive one, and is by the Circuit Court of Appeals of the Eighth Circuit. The opinion is delivered by Thayer, J., and a voluminous review of authorities is contained therein, and the doctrine of estoppel, as herein invoked, is fully recognized.

It is said that complainant (Swope) is entitled to recover as against the mortgage of Gilchrist to B. M. Stratton, trustee, of June 1, 1891, because, at the date of the execution of said mortgage, the Loan Association had not complied with the Act of 1891, in filing its charter with the Secretary of State, and causing an abstract thereof to be registered in Shelby County, and that before said charter and abstract was filed (August, 1894), W. C. Swope had taken an assignment of the notes executed by Robert Thompson to M. M. Gilchrist, secured by the mortgage, or trust deed, of May 25, 1892, executed by Thompson and wife, and, therefore, as to this transaction, Swope had a vested right, by reason of his purchase before the validating Act of May 10, 1895, and, therefore, said validating Act was retrospective, and could not interfere with his rights under the Thompson mortgage.

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Section 1, of the Acts of 1895, chapter 119, is as follows:

“SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the contracts of any foreign corporation, created or organized by any State or government other than that of this State, that has heretofore engaged in business, made contracts, or purchased property in this State, after the passage of said chapters 95 and 122, of the Acts of 1891, without first complying with the provisions of the same, shall be as valid and binding in all respects as if a copy of its charter had been filed with the Secretary of State and an abstract of the same filed in each County where such corporation carried on business or made contracts: *Provided*, That this section shall apply only to such foreign corporations as have already in good faith complied with the provisions of said chapters 95 and 122 of the Acts of 1891, and chapter 31 of the Acts of 1877, by filing a copy of its charter with the Secretary of State, and recording abstracts thereof in each County in which said corporation carried on business or made contracts, or shall, within four months after the passage of this Act, so file such charter and abstract of same: *Provided*, However, that no mortgage or deed of trust executed to a foreign corporation upon real estate in this State, where such foreign corporation had not complied with the laws of this State at the time of such mortgage or deed of trust was executed, shall be foreclosed, either

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under a power of sale or judicial decree, until two years after the passage of this Act, but no alien corporation owning land in the State shall have the benefit of this stay of foreclosure proceedings.”

By Section 2 of said Act it is provided that not more than six per cent. interest on the amount actually received by the parties shall be collected. The record shows that in August, 1894, prior to said validating act, the Interstate Building & Loan Association had complied with the law.

In the case of *Butler v. United States Building & Loan Association*, 13 Pick., 679, this Court declared this Act of the Legislature constitutional and valid, and that it did not impair the obligation of contracts, but sustained them. In the opinion of the Court in said cause, the case of *Gross v. United States Mortgage Co.*, 108 U. S., p. 447, is referred to, in which the identical question presented in the case at bar was presented, in which the insurance company purchased under much the same conditions as Swope and Thompson did here, and the Court decided against its contention. See also *Ewell v. Daggs*, 108 U. S., 143. The case of *Shields v. Clifton Hill Land Co.*, 10 Pick., 123, is also cited and relied on. The doctrine there laid down may be generally stated as follows: “While no retrospective law or laws impairing the obligation of contracts may be made (Const. Tenn. Act 1, Sec. 20), still remedial legislation is not prohibited, and the constitutional provision does not stand in the way

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of statutes passed to cover defects or omissions in former enactments, or in the case of parties attempting to comply therewith. The general expression of the principle is that no one has a vested right in any remedy, and, we might add, nor in any want of remedy or in any policy of the State for the time being.

The acts of foreign corporations which have not complied with law are said to be illegal, invalid and unenforcible, and, in some cases, the expression is used that they are void. All these expressions mean the same thing that the contracts are illegal and invalid and unenforcible to the extent that the State will not lend its aid to their enforcement, and no right of action can be based thereon, but the legislature may, if it see proper, and upon such terms as it deems best, and proper, validate such contracts and allow them to be enforced. But while this principle is well established, it only applies as between parties to the contract which has been validated and made enforcible. It cannot be given effect retroactively so as to divest the vested rights of innocent third persons. 6 Am. and Eng. Encyc. Law (2d ed.), 940, note 1, citing *Sidway v. Lawson*, 58 Ark., 124, 956, note 4; *Smith v. Scarborough*, 61 Ark., 104; *Shattuck v. Byford*, 62 Ark., 431; *Barrett v. Barrett*, 120 N. C., 127; *Mughen v. Strong*, 80 Am. Dec., 441; *Brinton v. Seevers*, 12 Iowa, 389; *Thompson v. Morgan*, 6 Minn., 292; 1 Am. and Eng. Encyc. Law 2d ed.), 568, note 1,

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Newman v. Samuels, 17 Iowa, 528; *Grove v. Todd*, 41 Md., 633.

Mr. Cooley thus lays down the rule: "The operation of these cases (cases upholding curative statutes), however, must be carefully restricted to the parties to the original contract and to such other persons as may have succeeded to their rights with no greater equities. A subsequent *bona fide* purchaser cannot be deprived of the property which he has acquired by an act, which retrospectively deprives his grantor of the title which he had when the purchase was made. Conceding that the invalid deed may be made good as between the parties, yet if, while it remained invalid, and the grantor still retained the legal title to the land, a third person has purchased and received a conveyance, with no notice of any fact which should preclude his acquiring an equitable as well as a legal title thereby, it would not be in the power of the legislature to so confirm the original deed as to divest him of the title he has acquired. The position of the case is altogether changed by this purchase. The legal title is no longer separated from equities, but in the hands of the second purchaser is united with an equity as strong as that which exists in favor of him who purchased first. Under such circumstances even Courts of Equity must recognize the right of the second purchaser as best and entitled to the protection which the law accords to vested interests. Cooleys Const. Limitations, star p. 379. The cases

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in our own books cited above of: *Bulter v. Loan Association*, 13 Pickle, 579; *Shields v. Clifton Hill Co.*, 10 Pickle, 152, as well as the cases of: *Gross v. United States Mort. Co.*, 108 U. S., 488; *Ewell v. Daggs*, 108 U. S., 143, all recognize the law as being that vested rights cannot be defeated by validating acts, but they were all except *Gross v. U. S.*, cases where the controversy was between the original parties and the rights of the third persons had not intervened.

In the case of *Gross v. U. S. Mort. Co.*, *supra*, the third person (the insurance company) was affected by the validating Act, because it had obligated itself to pay the debt, and Gross, the assignee of the note, was held to be affected by this obligation, and thus placed in such relationship with the original parties as that the validating Act applied to him.

Now, in the present case, we may treat the contract between Gilchrist and the Association as unenforceable until the validating Act was passed. While thus unenforceable, Gilchrist sold to Thompson, and in the deed to him recited the mortgage to the Association. He transferred the purchase money notes to Swope, in payment of an amount due him. The question is: Are Thompson, the purchaser of the lots, and Swope, the assignee of the purchase money notes, affected by the validating Act? They each knew of the mortgage to the Association, and neither can be held to be strictly innocent pur-

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chasers, because in the conveyance made by Gilchrist to Thompson that mortgage and debt is recognized as resting upon the lots. Thompson did not, however, assume personally to pay that debt, as the insurance company did in the Gross case. Swope stands still one remove further than Thompson, since he took the notes by indorsement from Gilchrist, but his condition is, perhaps, no better, unless he can be treated as an innocent purchaser. He appears in the Record to be a *bona fide* purchaser, but he had notice of the encumbrance upon the lots, and the contention is that he bought with knowledge that such encumbrance was not valid and could not be enforced. He took the notes, however, in payment of a pre-existing debt, and with notice of the mortgage, to the Association, and can, therefore, occupy no higher ground than Gilchrist, from whom he obtained the notes.

The fourth error assigned is to the action of the Court in the direction as to the account to be taken between the Association and borrower. The general rule for such accounts in cases of insolvency is stated in a number of cases. *Rogers v. Hargo*, 8 Pick., 35; *Post v. B. & L. Association*, 13 Pick., 408; *Carpenter v. Richardson*, 17 Pick., 176; *Carpenter v. Frayser*, 18 Pick., 462. While this is the rule to be applied in all cases of insolvency, the important question is when or at what date should the account be struck. Gilchrist defaulted in his obligations to the company in June, 1895, and his

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rights as stockholder and borrower were declared forfeited at that date. The Association was then a going concern and presumably solvent. It afterwards became insolvent.

We are of opinion that the account between Mr. Gilchrist and the Association should be made up and stated as of the date when his rights were declared forfeited, and upon the basis of a solvent, going corporation, and that the Association, after making such declaration, could not hold the stock until the company became insolvent, and make up the account as upon a final distribution of an insolvent association. The rights and liabilities of Gilchrist to the company were fixed when he ceased to be a member and when the Association declared his rights forfeited. As to this feature, therefore, the decree of the Court below is modified, and in all other respects it is affirmed.

The costs of the appeal will be equally divided between Swope and the Association. The costs of the Court below will remain as adjudged by that Court.

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BURNETT, ADMRX., v. RAILWAY OFFICIALS, ETC.,
INSURANCE CO.

(*Jackson.* May 25, 1901.)

1. ACCIDENT INSURANCE. *Construction of policy.*

Under an accident policy providing that "the death of the insured shall immediately terminate all liability under this policy, and in no case shall the insured be entitled to recover for more than 104 weeks hereunder," there can be no recovery for the death of the deceased.

2. SAME. *Same.*

The Court holds that the scope and effect of said policy cannot be enlarged so as to include indemnity in case of death by the extraneous matters averred in the declaration and set out in the opinion.

FROM MADISON.

Appeal in error from the Circuit Court of Madison County. LEVI S. WOODS, J.

HUNTER WILSON for Burnett.

C. G. BOND for Insurance Co.

WILKES, J. This is an action upon a policy of insurance in the Railway Officials & Employees Accident Association of Indianapolis, Indiana. There

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was a declaration and an amended declaration in the Court below which was demurred to. The demurrer was sustained and suit dismissed, and the plaintiff has appealed to this Court and assigned errors. The policy is set out in the declaration. It is marked on its back "*Noncontestable Weekly Indemnity Policy*," in bold and prominent letters. The words "*Weekly Indemnity*" are also made prominent by large letters in the face of the policy. So far as necessary to state, it provides to insure F. L. Franklin as a freight brakeman, and agrees to indemnify him against physical bodily injury resulting in disability caused by external violence or accidental means. Disability is defined in it to be immediate, continuous and total inability to perform any work or labor, and other provisions follow as to the loss of hands or feet, etc. It is further provided, that the insured shall be indemnified against loss of time during such period of continuous total disability in the sum of \$10 per week, but not to exceed his average weekly wages, nor for more than 104 consecutive weeks. By a separate clause of the policy it is provided, "The death of the insured shall immediately terminate all liability under this policy, and in no case shall the insured be entitled to recover for more than 104 weeks hereunder."

There is no provision in the policy referring in express terms to the death of the insured and providing a payment therefor. Plaintiff exhibits with his declaration and in connection with his policy, an

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identification card, which is, in substance, as follows, so far as necessary to be stated, "*This card is for identification.*" Notice, in accordance with the policy, must be given of accidental death or injury.

The declaration avers that the insured, while in the discharge of his duty as a brakeman, and exercising due care, was, May 25, 1900, accidentally thrown or knocked from a car and run over by the wheels and killed. The identification card was found on his person, and the plaintiff, as his administratrix, under these facts, claims \$1,040. The amended declaration avers, in addition, notice to the company of a previous accident and injury to the insured on April 28, and that, upon the happening of that accident, the company sent the insured a blank form which was made out and intended to cover death, and which was filled out by the insured as covering \$700 of insurance in case of death. This letter and blank claim are made part of the amended declaration, as well as the policy and identification card, and he avers that, by reason of the policy, identification card and final claim blank, and other representations of defendant to the insured, that it was the intention of the parties that the policy should cover death by accidental means, and that he was insured against death, and, under that belief, paid premiums amply sufficient to cover one year's insurance against death.

The demurrer raises the ground that the policy was for indemnity only, and not against death; that

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all liability under it terminated by the death of the deceased; that it contains no provision for payment of a death benefit; that the blank claim referred to was used upon the occasion of a prior accident, and had no connection with this; that it was really filled in for \$7.00 and not \$700, as appears from its face; but this was done by the insured himself without authority; that there is no specification in the declaration of any representations other than those in the papers themselves.

We think the demurrer is well taken and properly sustained. The policy sued on is a weekly benefit indemnity policy, and specifies upon its face its objects and purposes. There is nothing misleading about it. It does not provide for any payment or benefit in case of the death of the insured, but, on the contrary, expressly provides that the death of the insured shall terminate all liability under the policy. There is nothing ambiguous about it.

The identification card does not put any different aspect upon it. It probably is a form intended to be used in cases of death as well as in indemnity policies. But whether so or not, the company could very consistently provide for notice of the death of the assured, not because it would thereby become liable for any amount, but under the terms of the policy its liability would be "*ipso facto*" terminated. The blank claim is entirely irrelevant to the present case.

It purports to be filled out by assured himself

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in proof of a prior accident, when insured mashed the little finger of his left hand, and claimed indemnity for five days therefor. It is true that this form has a blank space for amount claimed in case of death, which insured filled in with \$7.00, perhaps meaning \$700; but this was no doubt a general blank to be used in cases of policies insuring against death losses, as well as providing weekly indemnity.

There is no statement of any other representations than those contained in the papers. Indeed, no oral statements contradicting or adding to the policy would be permissible. It follows that under the terms of the policy, the insured was only guaranteed a weekly indemnity, and not only was not insured against death, but in case of death all liability of the company at once ceased. *Hull v. Am. Emp. Liability Ins. Co.*, 96 Geo., 413 (S. C., 23 S. E. Rep., 310; same case, 38 L. R. A., 537).

There was a policy form, designed to insure in a principal sum for death and also to provide a weekly indemnity. Only the blanks were filled out for the weekly indemnity, and the insured died within twenty-four hours after the accident. His representative was allowed to recover only for that time, though the indemnity provision was for a period not exceeding fifty-two weeks. It was said in that case, "Death evidently is not the kind of disability to which the policy refers." See also *Rosenberry v. Fidelity & Casualty Co.*, 14 Ind. App., 625 (S. C., 43 N. E. Rep., 317; 1 Am. &

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Eng. Enc. L., 2d Ed., p. 296); *Brown v. Ins. Co.*, 95 Fed. Rep., 935; *Hall v. Amer. Emp. Lia. Ins. Co.*, 23 S. E. Rep. (Ga.), 310.

The judgment of the Court below is affirmed with costs.

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(*Jackson*. May 25, 1901.

BENEFIT SOCIETIES. *Mother, not wife, takes benefit of certificate.*

The mother, not the wife, is entitled to the death fund due on a certificate issued by a benefit society to one of its members after his marriage, and made payable to him personally in the event of his total disability, and to his mother in the event of his death, where the constitution and laws of the society do not exclude the mother in express terms from the class of eligible beneficiaries, although they do provide that the beneficiary department of the society shall be established and maintained "to provide substantial relief to members and their families in the event of death or total disability."

Case cited: *Lane v. Lane*, 99 Tenn., 639.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County. F. H. HEISKELL, J.

WM. M. RANDOLPH, for Bridget Manley.

TURLEY & WRIGHT for Margaret Manley.

BEARD, J. The complainant, Bridget, is the widow of Joseph H. Manley, who died in June, 1895, and the defendant, Margaret Manley, was his

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mother. In the year 1882, the deceased, Joseph, became a member of a local lodge in Memphis, this being a subordinate lodge of an order known as the "Brotherhood of Locomotive Fireman." At the time of becoming a member he was an unmarried man, living with his mother, and continued to do so until his marriage to the complainant, Bridget, in the year 1886. By section 48 of the constitution of the order all members, save those disqualified as the result of a medical examination, were required to participate in the rights and burdens of what was designated as the "Beneficiary Department," but whether any certificate was issued to the deceased at the time he joined or afterwards, until the year 1887, is not shown in the record. In this latter year one was issued to him, which entitled him to share in that "department" to the amount of \$1,500, which amount "the order agreed, in the event of his total disability, should be paid him, or at his death, to Mrs. M. Manley, his mother." In January, 1895, on account of a change in the by-laws of the order (immaterial to this litigation), this certificate was called in and a new one was issued, which, like the former, was payable to his mother in the event of his death. It will be observed from the dates, that both these certificates were issued to and received by the deceased subsequent to his marriage.

After the death of Joseph, upon proper proofs being made, the money due on this beneficial certi-

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ificate was paid, by the order to the mother. This payment was made, according to the testimony of the secretary and treasurer, in obedience to the "constitution in force in 1895," which required him as such officer "to pay the money due on the account of the death of Joseph H. Manley to the person named in the beneficiary certificate."

Some three years after this payment the present bill was filed by the widow, in her own right and as the next friend of her minor children, seeking to recover from Margaret Manley this fund, upon either of two grounds—first, that it was the intention of Joseph H., and the agreement on the part of his mother, that the latter should hold the funds derived from his certificate in trust for the complainant; and second, that, notwithstanding the fact that the mother was named in the beneficiary certificate, as the party to receive payment, yet under the constitution of the order, the equitable ownership of the fund was in complainants at the death of Joseph, and that in collecting it, the defendant, Margaret, was their trustee and must account to them as such.

As to the first ground, that of fact, on which this contention is made, we think it not well taken. The evidence fails to make out either a purpose upon the part of the son to create a trust in favor of complainants, or an agreement on the part of the mother to hold the certificate or its proceeds in trust for them. On the contrary, we are satisfied,

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that it was the intention of the son that the mother should be the absolute owner of the fund at his death. The fact that twice after his marriage he caused certificates to be issued payable to her, when, if he had desired his wife and children to be the beneficiaries, he could upon the suggestion have had them named as such, strongly repels the contention. The additional fact, indicating that the mother regarded herself, and was so regarded by him, as the sole beneficiary of the fund, is that from the beginning she paid all or quite all the assessments necessary to keep this insurance alive.

We see nothing in the record to overcome the force of these facts, which the theory of complainants, resting on the first ground, necessarily encounters. Nor do we think the second contention of the complainants is maintainable. Upon the face of the certificate, beyond question, Margaret Manley was entitled to this fund, and, having collected it, can hold it against all claimants. But the insistence is, that the constitution of the order, subject to which the certificate was issued, creates a special class of beneficiaries of the trust fund; that the mother, in this case, was not of that class, and, therefore, the payment to and receipt by her of the sum in question was on equitable principles, for the benefit of the complainants. This contention must rest alone upon a construction of the constitution. For it is clear upon this record that the order, in paying it to her, did so believing that she was en-

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titled to it as the true and absolute owner; and it is equally clear to us, that she received it in good faith, and without question as to her right to so receive it.

We will now consider the clauses in the constitution bearing on this claim of complainants:

Section 41 provides that "the Grand Lodge shall establish and maintain . . . a beneficiary department, in which all members who are eligible thereto are required to participate, levy assessments for the maintenance and support of the said department. . . . The assessments so levied shall constitute a fund, to be known as a beneficiary fund, which shall be disbursed exclusively in payment of beneficiary certificates in cases of death or total disability of members in good standing."

Section 47 is in these words: "The beneficiary department of this order, established to provide substantial relief to members and their families in the event of death or total disability, shall be known as the beneficiary department of the Brotherhood of Locomotive Firemen."

Section 49 provides the form of application for a beneficiary certificate, and Section 50 that for the certificate. To this latter section the certificate issued to Mrs. Manley in every respect conformed.

It will be observed that there are no restrictive words in Section 47. The terms used are general, and declare the purpose for which this beneficiary department is established, without fixing or under-

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taking to fix beyond recall, a class to which, in case of death of a member, the money provided for must of necessity go. While the clear implication is that the fund raised is for the "substantial relief to members or their families in the event of death or total disability," yet there are no words depriving the member of the right to designate any member of his family he may see proper as a beneficiary, or which gives one member of such family a fixed right superior to that of another.

By a reference to 1 Bacon on Benefit Societies, S. S. 243, 244 and 245, it will be found that there is more or less of divergence of opinion in the Courts in construing beneficiary clauses in the charters, constitutions and by-laws of the associations, one of whose objects is to provide an insurance fund, payable on the death of a member. Some of the Courts have adopted what may be termed a rigid construction, while others have taken what Mr. Bacon calls a "more liberal view" (section 245) of these clauses. The cases of *Hanna v. Hanna* (Texas) 30 S. W. Rep., 820, *Lister v. Lister*, 73 Mo. App. R., 99, and others relied on by counsel of complainants, may be said to have adopted the more rigid, while this court has ranged itself with those taking the "more liberal view."

In the case of *Massachusetts Catholic Order of Forresters v. Catherine Callahan et al.*, 146 Mass., 391, a certificate was issued to the mother of a member who afterwards married and then died. In

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a contest over the proceeds of the certificate between the widow and the mother, it was held that the mother was entitled to take, notwithstanding the marriage.

It is true this case was rested on a statute enlarging the class of beneficiaries of such associations, yet the Court discussed a provision in the constitution of the Association very similar to the one we are now dealing with.

The Court said: "It is also contended that by its constitution the Association had so limited itself that it could not accept a designation of the mother. We [have no occasion to consider whether a beneficiary association might not, by its constitution, so limit itself in its operations that its endowments should be only for the benefit of one or more classes of those whom it might lawfully entitle thereto, as for the widows only or orphans only, of deceased members. We find no such intention manifested by this Association. The argument on the part of Mrs. Keepe (the widow), is that the constitution of 1882, under the title "object" has the effect to limit the benefits of the Association to two classes of persons only, widows and orphans.

The "name and object" of the Association are stated in the preamble to the constitution. It is declared that the object of the organization is to promote friendship, unity and true Christian charity. It defines each, unity being defined as "unity in uniting together for mutual support, and in making

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suitable provisions for the widow and orphans." It would be a very forced construction to infer from this generality that the Association had thus excluded itself from making provisions for those who were dependent on the deceased, which it legally might make when this constitution was originally formed, or for his relations which it might make when Callahan became a member."

In *Manuby v. Knight of Birmingham*, 115 Pa. St., 305, the same liberal construction was given to a charter clause of one of these beneficial associations, which was in these words: "The purposes of this corporation shall be the maintenance of a society for the purposes of benefiting the widows and orphans of deceased members." A person, other than a widow or orphan of a deceased member to whom a certificate had been issued, when demanding payment, was met by a defense that the contract was *ultra vires*, and it was so held by the lower Court.

In reversing this decision the Court of last sort said: "We think this is too narrow and strained a view to take of this section of the charter. While it is true that the general purpose of the corporation is there stated, the maintenance of a society for benefiting and aiding widows and orphans of deceased members, it must be observed that this is the only statement of a general purpose . . . There is no prohibitory or restrictive language excluding from the powers of the

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corporation the right to contract specially with the member for the payment of benefits to other persons than his widow or orphans.”

This liberal rule was applied by this Court in *Lane v. Lane*, 99 Tenn., 639. The controversy there was between the widow of a deceased member of the American Legion of Honor and a brother, who was designated as the beneficiary in a certificate issued.

This Order was incorporated under the laws of the State of Massachusetts, and one of its statutory purposes was “to establish a benefit fund from which, on satisfactory evidence of a death of a member of the Order, who had complied with all its lawful requirements, a sum not exceeding \$5,000 shall be paid to the family, orphans, or dependants, as the member may direct.” A by-law of the order designated as beneficiaries “husband and wife . . . relatives or persons dependant on the member.”

The insistence of the widow was that the term “relative,” used in the by-law, is shown by the context to mean such relatives as are dependent upon the assured. But this contention was held to be unsound, and that the word “family” and “relative,” used respectively in the organic law and by-laws, clearly permitted the member to select his brother as a beneficiary, although the latter was in no sense a “dependent” of the former.

Following the line of these decisions, and espe-

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cially of the one last referred to, there is no reason why the mother of Joseph H. Manley should not have been named as the beneficial owner of the certificate in this case, and was not entitled to the fund, in her own right, upon his death.

In the constitution of the order we are now dealing with, there is no context from which to argue, with apparent force, as in *Lane v. Lane* supra, that the word "family" is to have a narrow meaning, so as to confine it to those constituting the immediate household of the deceased member. Especially should this narrow construction be avoided in a case like the present, where the mother had a clearly insurable interest in the life of the member. *Warmick v. Davis*, 104 U. S., 927.

We think there was no violation of the organic law in the issuance of this certificate to the mother, although the member was at the time a married man; and we are satisfied that, when the money was paid to her, it was in discharge of a valid obligation assumed by the order, in strict conformity with Section 51 of its constitution, which is as follows: "Upon the death of a beneficiary member in good standing, the person or persons named in the beneficiary certificate shall be entitled to receive, from the beneficiary fund of the order, the sum mentioned in the beneficiary certificate issued from the Grand Lodge office, as determined by his application for the same and the record of the Grand Lodge."

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The view we have expressed, we are satisfied, conforms to the spirit of the constitution of this Association, as well as to the letter of its obligation, and certainly reaches the merits of this case. It follows that the decree of the Chancellor is reversed and the bill of the complainants is dismissed.

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STATE, *ex rel.*, v. L. P. COOPER, JUDGE.

(*Jackson.* May 25, 1901.)

1. MANDAMUS. *To control Judge's action touching bills of exceptions.*

This Court has undoubted power. in a proper case, and in aid of its appellate jurisdiction, to compel a trial Judge to sign a bill of exceptions. (*Post*, pp., 209-211.)

Cases cited: *State v. Hall*, 3 Cold., 255; *State v. Elmore*, 6 Cold., 531; *State v. Hall*, 6 Bax., 7; *Memphis v. Halsey*, 12 Heis., 214; *Ingersoll v. Howard*, 1 Heis., 248; *Alexander v. State*, 14 Lea, 91; *Van Vabry v. Staten*, 88 Tenn., 334; *State v. Sneed*, 105 Tenn., 711; *Galloway v. Fleing*, 2 Shann., 614.

2. SAME. *Same.*

But a trial Judge who has signed bill of exceptions, certifying the facts as he understands them, will not be compelled to certify additional matters relating to occurrences in open Court, *e. g.*, the *voir dire* examination of a juror, where he denies upon personal knowledge and recollection the correctness of such additional matters, and there is no sufficient proof in the record to overcome the Judge's recollection of the facts, even if such proof could be sufficient for that purpose in any case. Proof by affidavit or otherwise, not made part of the record sent up, will not be considered in such case to impeach trial Judge's recollection. (*Post*, pp., 209-213.)

3. BILL OF EXCEPTIONS. *Matters not part of.*

A mere oral statement and offer to prove certain facts on motion for new trial without producing and setting out the proof, by affidavit or otherwise, in the bill of exceptions, or asking time to do so, presents no question that can be considered by this Court. (*Post*, pp. 211, 212.)

FROM SHELBY.

Appeal from the Criminal Court of Shelby County.
L. P. COOPER, J.

State, *ex rel.*, v. L. P. Cooper, Judge.

A. B. PITTMAN and B. HARRIS MOTLEY for petitioner.

ATTORNEY-GENERAL PICKLE for Judge Cooper.

WILKES, J. This is a petition for mandamus to compel Hon. L. P. Cooper, Judge of the Criminal Court of Shelby County, to sign a bill of exceptions in the case of the State of Tennessee v. John Shaw, convicted of murder and sentenced to be hanged by that Court, and who has appealed to this Court.

The petition alleges that a true bill of exceptions was presented to the said Judge by the counsel for the petitioner, who was the defendant in that cause, and that he refused to sign the same, and has signed another, imperfect and untrue, bill of exceptions, which is now on file with the transcript in this Court. It further alleges that a true bill of exceptions is essential to the rights of petitioner.

The petition further avers that counsel for petitioner presented to said Judge a statement, as follows: "J. F. Monroe, one of the jurors trying this case, was, when being examined on his *voir dire* touching his competency to sit on this case, asked by counsel whether or not he had served on the regular panel of a jury in Shelby County, Tennessee, within the past two years, and the said Monroe answered that he had not;" and requested that it be incorporated into the bill of exceptions which is now on file in this Court, and which bill is imper-

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fect without said statement; that said statement is true and embodies the question and answer of said J. F. Monroe, under oath on his *voir dire* examination, and ought to have been incorporated in said bill of exceptions, and said Cooper refused to incorporate it therein; that petitioner, on a motion for a new trial, offered to produce witnesses who were then present in the court-room and heard the question and answer, and the Judge refused to hear any evidence on the subject.

Petitioner further avers that he is innocent of the crime for which he has been convicted, but that he has not been tried by a jury of lawful men; that J. F. Monroe had perjured himself, and was incompetent to sit on the jury.

The prayer is that the trial judge be required to sign the bill of exceptions tendered to him, and with the petition tendered to this Court, or that an alternative writ of mandamus issue, compelling him to sign the said bill or show cause why he should not do so, [and if not entitled to that relief then that a peremptory or alternative writ issue to compel him to incorporate in the bill of exceptions already signed the statement quoted above, showing the question put to and answer made by said J. F. Monroe on his "*voir dire*" examination, and that this Court prescribe in what manner and at what place the proof as to the issues raised by the petition shall be taken.

The petition is sworn to by petitioner and counsel. It is accompanied by the affidavits of Rowan

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A. Greer, attorney, Chas. Glass, R. H. Motley, attorney, and by the certificate of the Clerk and A. B. Pittman, an attorney, all of them going to substantiate in whole or part the statement made in the petition.

Mr. Greer states that he heard the question asked of Mr. Monroe, and heard him answer that he had not served; that the question was twice asked and twice answered, and that he was impressed at the time that the answer was untrue, since he knew, as a fact, that Monroe had served upon a regular panel in Shelby County within two years next preceding, and that he was present in the Court room when the motion for a new trial was made, and was ready to give this statement in an affidavit.

Charles Glass states that he was present at the trial, was paying careful attention, and could not be mistaken about the fact; that the question was twice asked of Monroe, and twice answered by him in the negative.

Mr. Motley testifies that he was the attorney who examined Monroe upon his "*voir dire*," and that he was asked the question by himself, and that Monroe answered in the negative; that he was present on this motion for a new trial, when his associate attorney, Mr. Pittman, proposed to prove that Monroe had been asked the question, and had answered in the negative, and also to prove by the Clerk (Boswell) that Monroe had served on a regular panel

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within two years, and this was refused by the trial Judge and motion overruled.

L. E. Boswell states that he is Clerk of the Circuit Court of Shelby County; that Monroe was on the regular jury in that Court in November, 1900, serving from the nineteenth to the twenty-second, when it coming to the knowledge of the Court that he had served on a regular panel within two years next preceding that date, he was discharged from further service, and that he was present on the motion for a new trial in Shaw's case, and ready to give testimony as now stated.

The trial judge indorsed on the bill of exceptions presented to him and asked to be signed the following: "I have signed a full bill of exceptions, which is a true one, and after a careful consideration of the whole matter, I am thoroughly satisfied that the bill signed by me is correct in every particular. I refuse to sign this, which is tendered to me for the first time to-day. The bill of exceptions signed by me is one heretofore tendered to me by counsel for defendant, which, with corrections and additions made by me, is the true bill in this cause. The defendant's counsel objected to the corrections and additions thereto, and requested that the above be signed as the true bill of exceptions, which I decline to do. May 31, 1901. L. P. Cooper, Judge."

The original bill of exceptions signed by the trial judge, and which is a part of the record, states in

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addition that, on the motion for a new trial, the Court refused to hear evidence on the question of the examination of the juror, Monroe, and gave as his reason that he remembered distinctly that no such question was asked of the juror, nor was such answer given. The counsel offered to introduce the Clerk of the Court to prove that Monroe had served on a regular jury panel within two years, and the trial judge refused to allow this to be done, as that was not in issue before the Court. He also proposed to introduce attorney Greer to show that the witness, Monroe, was examined and answered as stated, and this was refused. Thereupon a Deputy Sheriff stated that one of the jurors in the Shaw case desired to make a statement to the Court, and did state that Monroe told him that he had not been examined as to his service on the jury. This was also excluded, the Court stating that it was improper, and further that the Court knew that the examination had not been made, and the question had not been asked nor answer given.

The answer of Judge Cooper to the petition for mandamus has been filed, in which he states positively and emphatically that the bill of exceptions filed by him originally in the case is a true and correct and perfect one, and that the one now asked to be signed is not true and correct. He admits that he refused to incorporate into the bill of exceptions the matter in relation to the juror, Monroe, because the question indicated was not asked Monroe

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as stated on his "*voir dire*" examination, and he expressly and unequivocally denies that such question was asked, and states that at the time he was noticing the examination of Monroe and paying attention thereto, and his recollection is distinct and positive that the question as indicated was not asked. He further states that on the motion for a new trial, counsel orally offered to introduce witnesses to prove that the question was asked, but no affidavit was at that time offered in support of the motion, and no time was requested to prepare such affidavit, and he, as trial Judge, refused to stay or delay proceedings in order to allow counsel to go and get witnesses, for the reason that he knew the question had not been proposed to said Monroe.

He repeats in emphatic terms that the bill of exceptions which he signed and had filed contained a true and perfect statement of the proceedings had in the cause, both on the trial and subsequent thereto. He attaches to his answer the affidavit of the juror, J. F. Monroe, and his fellow-jurors, E. S. Richmond, T. B. Todd, and of Walter L. Clark and J. P. Hefley, who state positively that they were present when Monroe was put on his "*voir dire*" examination, and that the question was not asked Monroe, as is claimed, whether he had served upon the regular panel of any jury in Shelby County within two years preceding, and Monroe adds that the only question asked him was whether he would render a fair and impartial verdict if taken, to which he answered

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yes, and if he would permit the fact that defendant was a negro, and the person alleged to have been raped was a white girl to prejudice him or influence him against defendant, and, upon his answering no, he was accepted as a juror.

The power of this Court in aid of its appellate jurisdiction to compel a trial judge to sign a bill of exceptions is too well established for question. *State v. Hall*, 3 Cold., 255; *State v. Elmore*, 6 Cold., 531; *State v. Hall*, 6 Bax., 7; *Memphis v. Halsey*, 12 Heis., 214; *Ingersoll v. Howard*, 1 Heis., 248; *Alexander v. State*, 14 Lea, 91; *Van Vabry v. Staton*, 88 Tenn., 334; *Galloway v. Fleing*, 2 Shannon, 614; *State v. Sneed*, 21 Pickle, 711.

In *Van Vabry v. Staton*, 88 Tenn., 334, it was said that this Court would not compel a trial Judge by peremptory mandamus, to sign a particular bill of exceptions, made out and presented by counsel with request that he sign it without alteration or refuse to do so, when the trial Judge, upon his oath, denies its correctness and the evidence is conflicting upon this point. The query is put in that case whether a trial Judge will be compelled in any case to sign a particular bill of exceptions, the correctness of which he denies on oath. The Court said: "In *Sykes v. Ransons*, the power to compel the signing of a particular bill was broadly asserted." 6 Johnson, 279.

"In *Bradstreet v. Thomas*, 4 Peters, 102, the Supreme Court of the United States held that it could

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not require a Judge to sign a bill of exceptions which he asserted did not contain the truth, and this case treats the decision of the trial Judge as final and conclusive. The great weight of authority is in accord with the holding of the Supreme Court of the United States." 3 Enc. Pl. & Pr., 491, and notes.

The case of the *State v. Hall*, 3 Cold., 255, was an application to compel the trial Judge to sign a particular bill or show cause why he did not. It was not a case of peremptory mandamus to compel the Judge to sign, but in the alternative to sign or show reasons. We think our cases go only to the extent of holding that the trial Judge may be required either to sign a particular bill or show cause why he will not do so, but they do not go to the extent that he may be required to sign one which he states is not correct. The ultimate decision as to what a bill of exceptions should contain rests with the trial Judge. And this is so to the extent that he may even decline to sign a bill consented to and presented by the attorneys on both sides, and he may change it when both parties insist that it is already correct, in his sound discretion and in order that it may embody the facts as he understands them. *Beaven v. The State*, 58 Ind., 530 ; 3 Enc. Pl. & Pr., 446.

He may not refuse to sign a bill without more, but must sign one presented or propose corrections,

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or sign what he deems a proper and true bill.
3 Enc. Pl. & Pr., p. 448.

The mere act of signing a bill, which the trial Judge concedes is correct, is a ministerial one, and he may be compelled in such case to sign. *Jelley v. Roberts*, 50 Ind., 1. But when the question is whether the bill is correct and truthful, and should be signed as presented, it becomes a judicial one, which the Appellate Court will not settle. *State v. Hall*, 3 Cold., 262; *Miller v. Koger*, 9 Hum., 236; *Hake v. Strubel*, 121 Ill., 325; 3 Enc. Pl. & Pr., 491.

In the present case necessary steps have not been taken to put the record in proper shape. No time was requested to prepare affidavits to be incorporated in the record, and the only one that was offered was proposed after the application had been acted upon. It is true counsel stated that witnesses were in court and others could be had and would testify, but all this was done orally, without any affidavits, and no request was made for time to prepare such affidavits, and the trial Judge's recollection being distinct as to the matter, he refused to stay proceedings to allow counsel to go and get witnesses. But counsel might have prepared the affidavits and presented them at any time before court adjourned, and asked that they be incorporated in the bill of exceptions.

It would certainly be an anomaly to compel a trial Judge to certify the existence of a fact which

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he emphatically denies. If he concedes that the fact desired to be incorporated does exist, or if he does not remember, or if he does not deny its existence, but for any insufficient reason refuses to incorporate it in the bill of exceptions, he may be required to do so by mandamus. But when the matter is brought to his attention and he states in the bill of exceptions that the fact does not exist, and the statement desired to be incorporated is not true, and that he has signed a correct bill, stating the actual facts, he cannot be required to sign one that he states is incorrect and contains untrue statements, and the Appellate Court in such case will not require him to do so unless upon the clearest and most convincing showing made to appear properly before the Court below and incorporated in the record sent to this Court. 3 Enc. Pl. & Pr., 491, and note.

A different rule would lead to endless confusion. It would substitute the recollections of counsel and bystanders for that of the trial Judge. It would virtually put the Judge himself on trial whenever a difference arose between him and litigants or their counsel. Affidavits and counter affidavits might be heard, and a trial within a trial would result. And upon this trial the Judge himself, whose action is being questioned, would preside, and to his decision at last the case must be finally subjected, or he must be arraigned for trial before this Court or a commission.

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It may be that cases of hardship will arise, but this is an incident to all human proceedings, and a different rule would lead to much more serious complications and difficulties. Without holding that a case cannot be made out and properly presented which would call for the interposition of this Court, we are of opinion such case is not made out by the record.

We are of opinion that under the facts as they appear under this petition this Court cannot grant the writ of mandamus as asked for, and it is refused.

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(*Jackson*. May 25, 1901.)

1. TAX SALE. *Void for want of description of land.*

A judicial sale of lands for taxes is void, although the decree contains a full and sufficient description of the lands, where the pleadings upon which it is based contain no such description. (*Post*, pp. 219-221.)

Cases cited: *Morristown v. King*, 11 Lea, 669; *Rhinehart v. Nealis*, 101 Tenn., 169.

2. SAME. *Same.*

The opinion affords several examples of tax sales made under decree which are held void for want of sufficient description in the pleadings of the property sold. (*Post*, pp. 216-220.)

3. SAME. *Collateral attack.*

A tax sale, when set up to the prejudice of a third person, who was not a party to the tax proceedings, may be impeached collaterally by such third person by proof *dehors*, the original record showing that the proceedings and sale were erroneous either in law or fact. (*Post*, pp. 220-223.)

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
S. J. SHEPHERD, Special Chancellor.

F. H. HEISKELL for Colligan.

L. & E. LEHMAN for Cooney.

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BEARD, J. This is a controversy over three lots in the city of Memphis. The complainant's title rests upon decrees of sale pronounced in two suits begun in the Chancery Court of Shelby County, by the State, to enforce liens for taxes claimed to be due for the years 1891 and 1892 from the owners on these lots. One of these suits was styled *State v. Rees*, and the other *State v. Leggatt*, the first of which was filed on the 10th, and the latter on the 12th of January, 1894. At the sale made under the decrees in these two cases, complainant became the purchaser, and, having paid the purchase price, decrees were entered divesting title out of the parties to the suits, and vesting it in him. Prior to the institution of these tax suits, the defendant, Annie Cooney, filed her bill in the Chancery Court of Shelby County against Bridget Cooney, Alice Cooney, Mary E. Cooney, and another, in which she alleged that she was a creditor of Bridget Cooney, and that, since the creation of her debt, the latter had made conveyances to Alice and Mary E. Cooney of the lots in controversy, without consideration and for the purpose of hindering, delaying and defrauding her creditors, and especially the complainant, and the Court was asked to avoid these conveyances and subject these lots to the payment of complainant's debt. This cause proceeded to a decree fixing the amount of the debt, adjudging the conveyances in question to be fraudulent in fact and law, and

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subjecting the property to the satisfaction, *pro tanto*, of complainant's claim.

Under this decree, sales were made, at which complainant purchased. These sales were subsequently confirmed and title to the property vested in Annie Cooney, and a writ of possession was ordered. This writ the present bill was filed to perpetually enjoin.

No question is made on the regularity of the last mentioned case. The contention of the present complainant is that he acquired title under decrees pronounced in causes which, though filed subsequently to that of *Cooney v. Cooney*, were instituted to enforce a paramount lien for taxes which antedated the last mentioned case, and to which the then record owners of the property, to wit: Alice and Mary E. Cooney, were regularly made parties, that he thus became its absolute owner, and was entitled to protection against the writ of possession. This contention is based on *Dunn v. Dunn*, 99 Tenn., 598.

To this, the answer of defendant is that the pleadings in the tax suits failed altogether to identify the property which was sought to be subjected, and that the decrees for sale pronounced in the two causes of *State v. Rees* and *State v. Leggatt* for the first time identifying them and describing them by metes and bounds, were unwarranted by any proper pleading, and therefore were *coram non judice*.

To understand this defense, it is necessary to state the facts. The bill in the case of *State v. Rees* was filed against many defendants owning vari-

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ous parcels of property. To this bill Alice and Mary E. Cooney were made defendants, and it was alleged that they were the owners of "lots 46, 74 by 148½ feet, listed to J. T. and P. Cooney," and "pt. lot 287, 24 by 74 W. S. Jackson, listed to J. T. Cooney."

The bill in *State v. Leggatt* was also an omnibus bill, to which, among others, Alice E. Cooney was made a party, and the property of hers sought to be reached is thus described: "Country lot 500—50x159, N. S. Washington street." The case of *State v. Rees* proceeded without other description of the lots embraced in it, up to and including the Master's report, after the filing of which a decree was entered confirming it and ordering a sale of these lots, when they were for the first time identified by specific description as follows: "A certain lot, being the north part of lot 46, as designated in the plan of the city of Memphis, beginning at the northeast intersection of Chickasaw or Front street with the alley between and parallel with Jackson and Overton streets, thence south with Chickasaw street 26 feet 1 inch, thence east at right angles with Chickasaw street 148½ feet to an alley, thence north with said alley 26 feet 1 inch to another alley, thence west with said alley 148½ feet to the beginning. 2. A certain lot beginning 49 feet, at a point on Jackson street, city of Memphis, east of the southwest corner of lot 287 on the north side of Jackson street, thence eastwardly

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with the north side of Jackson street 24 feet to a point on Jackson street, thence northwardly and parallel to Second street 74 feet, thence westwardly and parallel with Jackson street 24 feet to a point, thence southwardly and parallel with Second street 74 feet to the beginning."

The proceedings in *State v. Leggatt* was altogether similar until the decree for sale was reached, which, for the first time, identified the Washington street lot as follows: "A certain lot, beginning on the north side of Washington street, 390 feet east of High street and 32 10-12 feet east of Mrs. Rhinehardt's fence, thence northwardly and at right angles with Washington street 156 10-12 feet to center of alley, thence southwardly 156 $\frac{3}{4}$ feet to Washington street, thence westward 50 feet to the beginning."

The evidence adduced in the present cause shows that lot 287 has a frontage of 74 feet and 3 inches on the west side of Second street and runs back westwardly 148 feet and 6 inches to an alley, having for its northern boundary line Jackson street, and that the portion of it which defendant Annie bought and which complainant claims under his purchase, fronts 24 feet on the north side of Jackson street, and has a depth of 74 $\frac{1}{2}$ feet, and is situated 49 feet east of the alley between Main and Second streets, and is a little less than one-sixth of the whole lot 287.

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As to country lot 500, the evidence discloses that it has an area of 23 acres, with a frontage on Washington street of more than 700 feet. That part of this lot, which defendant bought and which complainant claims under his purchase, fronts 35 feet on the north side of Washington street, and begins about $396\frac{1}{2}$ feet east of High street, having a depth of 156 feet.

The question on this record, then, is, can the specific decrees for sale describing, by metes with bounds, the portions of lot 287, 46 and 500 be saved on pleadings that lack all description of identification of those portions?

The rule in regard to tax deeds is, that to be valid they must contain such description as will, without the aid of extraneous facts, designate with reasonable certainty the property sought to be conveyed. To this proposition many cases may be cited. These may be found in first note to p. 686, 25 Am. & Eng. Enc. Law, 1st ed.

We think it is clear under this rule that, if a tax deed had been executed describing these lots as they are described in the pleadings and other papers in the cases of *State v. Rees* and *State v. Leggatt*, down to the decrees for sale, that it would have been held void for vagueness. If this be so, we are not able to understand that the pleadings in these cases stand on higher ground. That they do not we are satisfied. It follows, therefore, that the decrees for sale, following such vagueness in plead-

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ing, though themselves specifically describing the lots, lack all foundation and are *coram non judice*. Such decrees stand as if entered without pleadings, or as if these lots were for the first time brought into the record. This is but the application of a general rule to these tax proceedings.

A few cases, illustrating the view of various courts on this subject, are referred to.

The sale of land by an administrator, which is included in the order of sale but not described in the petition, has been held void in California and Massachusetts. *Townsend v. Gordon*, 19 Cal., 188; *Very v. McClelland*, 6 Gray, 535. In Arkansas, a report of commissioners, appointed to assign dower, was declared void, because it included a parcel of land not included in the petition. *Full v. Wright*, 18 S. W. R., 1044. In Missouri, a decree in a tax foreclosure proceeding, which correctly described the land as in K's second addition, was adjudged void, because the petition described it as in K's addition. *Milner v. Shipley*, 7 S. W. R., 175. And in *Mayor, etc., of Morristown, v. King*, 11 Lea, 669, where property was insufficiently described in the assessment, but accurately so in the report of sale, it was held that the latter perfect description did not cure the former imperfect one. But it is insisted that the vagueness of description in these tax suits only became apparent by the introduction of evidence *dehors* the record, and that to consider

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this evidence is in violation of the rule announced in *Rhinehart v. Nealis*, 101 Tenn., 169.

That case was one of a party to a suit who by a subsequent proceeding sought to impeach a decree pronounced in the former by setting up an extraneous fact, which existed during the pendency of that suit. In such a case the rule is well established that "domestic judgments of courts of general jurisdiction cannot be attacked by evidence outside of the record itself."

Here, however, we have a very different case. The proceedings in the tax suits are called in question by one who is neither a party nor a privy to those suits. The distinction between the two classes of suits is universally recognized, says Mr. Wharton in Vol. 2 of the Law on Evidence, Section 820: "A record is bilateral when introduced between parties and privies, and when so . . . cannot be disputed. Records, on the other hand, are unilateral when offered to show a particular fact, as a *prima facie* case, either for or against a stranger. Even parol testimony may be used to explain their applicability in such a case." The rule as to strangers to the record is that of *res inter alios acta*, embodied in Brown's Legal Maxims, 858, as follows: "A transaction between two parties ought not to operate to the disadvantage of a third." As is said in 1 Freeman on Judgments, Section 154, "it is a general rule that adjudication takes effect only between

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the parties to the judgment, and that it gives no right to or against third parties.”

In *Vose v. Morton*, 4 Cushing, 27, there was a controversy between a tenant in possession and the purchaser of land in an attachment proceeding to which the tenant was not a party. The purchaser insisted, as is done in the present case, that the judgment in the attachment proceeding was conclusive of his rights. To this the Court said: “A judgment is conclusive only against parties and privies. The tenant is in no sense a party or a privy to that judgment. [Being neither a party nor a privy to the judgment, he cannot have a writ of error to reverse it, although it may be erroneous and void; but when such judgment is set up collaterally to defeat the tenant’s title, which is otherwise good, and the tenant can show the judgment is erroneous, either in matter of law or fact, he may do so by proof.”] To the same effect are *Nason v. Blaisdell*, 12 Vt., 165; S. C., 36 Am. Dec., 331; *Winton v. Gorrell*, 3 Ire. Eq., 117; S. C., 40 Am. Dec., 456; *Schulze’s Appeal*, 1 Pa. St., 251; *Hunter v. Hutton*, 4 Gill, 115; S. C., 45 Am. Dec., 117; *Sidensparker v. Sidensparker*, 52 Maine, 481; S. C., 83 Am. Dec., 527; *Buffum v. Ramsdell*, 55 Maine, 481; S. C., 92, Am. Dec., 589.

So it is, upon authority, as well as a matter of common right, the defendant, Annie Mooney, was entitled to the benefit of the evidence put into this record, which showed the extent of lots 287 and 500,

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and the other lack of description in the pleadings of the parts of those lots which complainant attempted to buy in the tax suits.

As to complainant's claim to a portion of lot 46, it is in the same condition with the other lots, but it also fails for another reason. The decree under which he purchased, directed the sale of the *north* part of that lot. This is the portion which he bought, while the defendant was the purchaser of the south part of the lots. As a matter of course complainant has no ground for interfering with her as to this part.

The result is that the decree of the Chancellor is reversed, the bill of the complainants is dismissed, and the injunction made perpetual by the Chancellor is dissolved.

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PIERCE v. GIBSON COUNTY.

(*Jackson*. June 8, 1901.)

1. INJUNCTION. *Against creation of nuisance by county.*

Injunction lies to prevent the construction and operation by a county of a sewer system, for the purpose and with the effect of conveying from its court house and discharging upon private property the filth and excrement deposited in the public urinals and water closets, where it appears beyond reasonable doubt that there is real and immediate danger that material and irreparable injury will be thereby inflicted upon the property owner affected.

Cases cited: *Kirkman v. Handy*, 11 Hum., 406; *Vaughn v. Law*, 1 Hum., 134; *Brew v. Van Deman*, 6 Heis., 433; *Weakley v. Page*, 102 Tenn., 179.

2. COUNTY. *Has no power to create nuisance.*

The exemption against judicial interference and control ordinarily accorded to counties in the exercise of governmental powers and discretion, cannot be invoked to protect a county in such exercise of its powers and discretion, even for a public purpose, as creates, or threatens to create, a nuisance injurious to the citizen.

Cases cited: *Horton v. Nashville*, 4 Lea, 37; *Chattanooga v. Reid*, 103 Tenn., 616.

FROM GIBSON.

Appeal from Chancery Court of Gibson County.
JOHN S. COOPER, Judge.

WALKER & HUNT for Pierce.

TAYLOR & BIGGS for Gibson County.

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McALISTER, J. At the date of the filing of the bill herein and prior thereto, Gibson County had in course of construction a court house building in the town of Trenton, Tenn., in which building provision had been made for six water closets and urinals, to be connected with the sewer pipe which the building commissioners of said new court house were proceeding to lay down. The avowed intention of the committee in putting in the sewer, was to attach the court house closets to it, and, incidentally, they had arranged to connect the closets of the county jail and those of E. F. Watson Machine Shops to this sewer. The pipe for this sewer was ready for being put in, and part of it laid when complainants filed their bill in this cause.

The ditch in question is not a running stream, and only flows in times of rains and high waters. The sewage from the new court house building and from said water closets and urinals was intended to be conveyed through said sewer pipe and dry ditch and emptied upon the lands of complainants. It further appears that complainants are butchers and vendors of fresh meats, conducting a large business and using said lands for pasturing their cattle, sheep, hogs and goats, kept by them for butchering purposes. Their slaughter pens and houses were also situated on said lands.

On the 24th of November, 1899, complainants filed this bill to enjoin the building commissioners of the county from connecting the water closets and urinals

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of the new court house with said sewer pipes, alleging that if the sewage from the said court house be conveyed through said sewer and emptied at said point that it will create a public nuisance, and especially a nuisance to complainants, doing them irreparable injury; that the filth would be washed down, through the open ditch, upon complainants' lands, injuring their business, destroying their health, and diseasing their cattle.

A temporary injunction issued upon the fiat of the Chancellor. Answers were filed and proof was taken. On the hearing the Chancellor decreed that the injunction theretofore issued, enjoining the defendant, Gibson County, its agents and officers, from in any way connecting the water closets of the court house with the sewer pipe, and from emptying the sewage from the court house by means of same to said open ditch, and there emptying same, be made perpetual. The injunction was so far modified as to permit the work to be completed for the purpose of draining the basement of the court house.

Defendants appealed, and the first error assigned is that the suit was prematurely brought and should have been dismissed. The insistence is that no cause of action existed at the date of the commencement of the suit, since the court house was unfinished and there were no water closets as yet built. It is said further that there was no order by the County Court for the sewerage to be constructed for the water closets, nor had the Building

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Committee taken any action in regard to sewerage for the closets. Defendants insist that the object of the Building Commissioners in laying the sewer pipe was to drain the water from the basement of the new court house.

It is said that on November 23, 1899, the date of the filing of this bill, the walls had been about finished, but the building had not been covered, and to prevent the rain water from accumulating in the basement and injuring the work already done, the Quarterly County Court, on October 3, 1899, passed the following order: "Ordered by the County Court that the Court House Building Committee be, and they are hereby, instructed to take such steps as they may think best in regard to the protection of the basement of the new court house."

It is insisted that, acting under this order, the committee awarded a contract for a drain pipe, to convey the water from the basement of the court house building to a point near the northeastern boundary of the town, where it was to empty into a ditch. It is further said that this was the natural outlet for the water for the entire central and northeastern portions of the town, including the court square and the court house building, and had been used as such since the building of the town. The Chancellor, as already stated, modified the injunction, so as to permit the completion of the sewer and its use as a means of draining the water from the basement of the court house. But defend-

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ants are not satisfied with this modification of the injunction, but have appealed from the decree of the Chancellor, denying them the right to connect the water closets and urinals of the new court house with this sewer pipe.

The two positions assumed by defendants are somewhat inconsistent. But, upon a review of the testimony, we agree with the Chancellor, that defendants, at the date the bill was filed, were making provision to convey and empty the sewage from said water closets and urinals, and that it was the purpose of the defendants to connect the water closets of the court house with said sewer pipe. But it is argued that if the sewer is used for the purpose of discharging the sewage from the court house, it does not follow that it would create a nuisance; that a sewer is not a nuisance *per se*, and there is no presumption it will become a nuisance.

The case of *Kirkman v. Handy*, 11 Hum., 406, is cited, in which a bill was filed to restrain the defendant from proceeding to erect a livery stable in the city of Nashville, upon the ground that such stable would be a nuisance to the neighborhood "by reason of the filth, flies, persons, carriages, and animals that will gather about it, and that it will diminish the increase of complainant's property one-half and change the character of his tenants."

The Court held that a livery stable in a town is not necessarily a nuisance in itself, and that a Court of equity has no jurisdiction to restrain by injunc-

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tion, either the completion of a building intended for that purpose, nor its appropriation to the use intended. But in the course of its opinion the Court said, viz.: "In regard to private nuisances, the jurisdiction of courts of equity to interfere by way of injunction rests upon the ground of preventing irreparable mischief or multiplicity of suits Where the injury is irreparable, as where the loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful erection, in every such case courts of equity will interfere by injunction to prevent, as well as to remedy, the evil, citing 2 Story's Equity, Sec. 926. So in *Brew v. Van Deman*, 6 Heis., 433, it was held that a Court of equity has jurisdiction upon the ground of its ability to give a more complete and perfect remedy than is attainable at law to prevent by injunction such nuisances as are threatened, as well as to abate those already existing. The grounds of jurisdiction are the restraining of irreparable mischief, suppressing oppressive, and interminable litigation, or preventing multiplicity of suits, or where the mischief from its continuance or permanent character must occasion a constantly recurring grievance, which cannot be prevented otherwise than by injunction." See, also, *Vaughn v. Lane*, 1 Hum., 134, and *Weakley v. Page*, 18 Pickle, 179.

Says Mr. Beach, in his work on Modern Equity Jurisprudence, Vol. 2, Sec. 741, viz.: "An injunc-

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tion will lie to prevent a nuisance threatened, or in progress, as well as to abate one already in existence (citing many cases). But if a nuisance be merely apprehended, it must appear that apprehension of material and irreparable injury is well grounded upon a state of facts which shows the danger to be real and immediate. . If the injury is doubtful, eventual, or contingent, an injunction will not be granted, and if it is fully denied by the answer, or if upon the facts there is a reasonable doubt of the effect of its erection, the injunction will be denied until the question of nuisance is determined by the actual use of the property The Courts will not indulge in conjecture, that the manner in which a proposed erection will be conducted will prove a nuisance, and upon such imaginary fear or uncertain apprehension of speculative or contingent injuries, stop the erection of a public necessity. The fact that the work sought to be enjoined is one of a public nature, one which affects the public convenience, and that there is no doubt of the ability of the defendant to respond in damages, are important matters to be considered in determining the right to an injunction. When the injury is merely threatened, the rule is, if the act complained of is not a nuisance *per se*, but may or may not become so, according to circumstances, and the injurious effect is uncertain or contingent, equity will not interfere until the question is settled at law, or an issue directed by the Court."

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In the case of *Missouri v. Illinois*, decided by the United States Supreme Court, January 28, 1901, it was held that the threatened daily transportation by the Sanitary District of Chicago, by artificial means and through an unnatural channel, of large quantities of sewage and of accumulated deposits, which will poison the water supply of the inhabitants of the State of Missouri, and injuriously affect that portion of the bed or soil of the Mississippi river which lies within its territory, entitles that State to maintain a suit for equitable relief in advance of any actual injury sustained thereby.

In that case it was argued that the draining, by artificial means, of the sewage of the city of Chicago into the Mississippi river, may or may not become a nuisance to the whole State, cities, and towns of Missouri; that the injuries apprehended are merely eventual or contingent, and may, in fact, never be inflicted. Said the Court: "Can it be gravely contended that there are no preventive remedies by way of injunction, or otherwise, against injuries not inflicted or experienced, but which would appear to be the natural result of acts of defendant, which he admits or avows it to be his intention to commit?"

The Court, in answering this question, cites a large number of cases, English and American, sustaining the jurisdiction of courts of equity to grant such relief.

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We think these principles are applicable in the present case. It is charged in the bill, and such is the proof, that it was the purpose of defendants in constructing this sewer to empty and discharge upon complainants' lands the privy excrement and sewage from the water closets of the court house. Surely complainants cannot be asked to wait until the injury is inflicted before invoking the aid of a court of equity. If the danger is threatened and impending, a party has a right to a preventive remedy.

In *Wiley v. A. Hearn* (Ky.), 18 S. E. Rep., 529, an injunction was asked to prevent an adjoining landowner from building a privy in close proximity to plaintiff's house and well. The Court held, viz.: "It is said herein that the privy has never been used, the appellee has never yet suffered any injury, and that as it is shown it is possible to prevent leakage, and the omission of bad odors, therefore the appellee cannot resort to the process of injunction. A party is not required, however, to wait until the injury is inflicted. The object of the writ is preventive. Like the interdict of the civil war, it wards off the injury. It is true it cannot be called into exercise unless the right of the party invoking it be certain and a necessity exists for its aid; in other words, the case must be a clear one. But this does not mean there must be an absolute certainty of its need. If so, it could rarely be invoked. It is true the party cannot act upon a

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mere fear or apprehension, a mere possibility, or threatened injury, but if the damage be probable and threatening, he may invoke its aid, and need not delay until the injury is actually inflicted.”

Lastly, it is insisted on behalf of appellants that the location and construction of the sewer was the exercise by the county of a governmental power, and the discretion committed to it cannot be controlled by the Courts, unless a clear abuse of its power be shown. It is true, as argued, that the necessity for a sewer, its location and general plan, are matters which involve the exercise of discretion, and ordinarily the Courts will not interfere. *Horton v. Nashville*, 4 Lea, 37; *Chattanooga v. Reid*, 19 Pickle, 616.

But it is well settled that a municipality or county, in the construction of a public work, is not privileged to commit a nuisance, to the special injury of the citizens, and for such act is liable as a private individual in damages, or it may be restrained by the writ of injunction. *Chattanooga v. Dowling*, 17 Pick., 345, and authorities there cited; *Atlanta v. Warnock*, 23 L. R. A., 301, and note.

In the last case it was held that the municipal government of Atlanta, though invested by statute with plenary power on the subject of streets, sewers, etc., has no right to create and permanently maintain a nuisance dangerous to health and life, which nuisance consists of “man holes” in a sewer located in a public street contiguous to the dwelling of a citizen,

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the man holes being allowed to emit poisonous gases in large quantities through perforated covers placed over them.

While we entertain these views touching the law governing this case, we are nevertheless of opinion that the scope of the injunction granted was too broad. All that complainants had a right to demand was that the sewage from the court house should not be emptied upon their land; but the Chancellor went so far as to enjoin the county from even connecting the water closets of the court house with the new sewer. If the county should be able to change the route of said sewer and find another outlet and divert its channel from complainants' lands it should have the right to connect its water closets with said sewer, and complainant could not complain. It is, therefore, ordered by this Court that said injunction be so modified as to permit the county to connect the water closets and urinals of the court house with said sewer, provided the contents of said sewer are not discharged upon complainants' lands. With this modification of the injunction, the decree of the Chancellor is affirmed.

Herman Bros. v. Sartor.

HERMAN BROS. v. SARTOR.

(Jackson. June 8, 1901.)

INJUNCTION. *Deed made in violation of, not void, when.*

A deed made in violation of an injunction is not void or inoperative as to any one except the person for whose benefit the injunction was granted, and not as to him where he has consented to the making of the deed without dissolution of the injunction.

Cases cited: *Greenwald v. Roberts*, 4 Heis., 500; *Wilhoit v. Castell*, 3 Bax., 419.

FROM CARROLL.

Appeal from Chancery Court of Carroll County.
A. G. HAWKINS, J.

ALVIN HAWKINS for Herman Bros.

McCALL & McCALL for Sartor.

McALISTER, J. Complainants, as judgment creditors of W. H. Sartor, with *nulla bona* return of execution, filed this bill to set aside a certain conveyance of land from Sartor and wife to Cazort, upon the ground that it was made to defraud creditors and was also executed in violation of an injunction. The facts necessary to be stated are that

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W. H. Sartor and wife conveyed certain real estate, in the town of Huntingdon, to George T. McCall, as trustee, to secure an indebtedness of W. H. Sartor to J. C. R. McCall, dower and homestead being waived. The property conveyed was owned by Sartor and wife as tenants by entirety, and was worth more than the debt secured. On July 11, 1899, thereafter, one Wright, a judgment creditor of Sartor, filed a bill against Sartor and wife and McCall, trustee, to foreclose said deed of trust and subject the surplus to the payment of Wright's debt. An injunction issued in that case, upon the fiat of the Chancellor, restraining Sartor and wife from selling, transferring, or in any way further encumbering said property until the hearing of said cause. The injunction issued July 15, 1899, and the same day was duly served on Sartor and wife. On August 11, 1899, Sartor fully paid and discharged the debt he owed Wright, and, with Wright's consent, Sartor sold and conveyed the property in question to the defendant, Cozart. The present bill of Herman Bros. & Lindauer was filed on August 17, 1899, after the debt due Wright had been paid. No proof was taken tending to show that the deed from Sartor and wife to Cozart was made to hinder, delay or defraud creditors, but it is insisted that the conveyance is void for the reason that it was made in violation of the injunction issued upon the Wright bill. As already stated, the Wright debt was paid off on August 11, but the Wright injunc-

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tion bill pended until November 26, 1899, when the suit was dismissed at the rules, by order of complainant, upon the payment of the costs by the defendant Sartor.

We are unable to perceive how an injunction, sued out by Wright, can enure to the benefit of the present complainants. They were strangers to the Wright bill, and their bill, moreover, was not filed until after Wright's debt had been paid. The fact that the conveyance was made by, Sartor and wife to Cozart, before the injunction was dissolved, was a matter of which Wright alone could complain. But as already stated Wright was paid and he consented that the conveyance might be made.

In *Greenwald v. Roberts*, 4 Heis., 500, it was held that a purchase, made pending an injunction inhibiting a sale, is void against the interest of the complainant in the bill, but valid as to the vendor. It was insisted in that case that Nathan Greenwald was under an injunction against selling and conveying the land at the time of his conveyance to complainant and that the conveyance was therefore void.

The Court held that the injunction was intended for the protection and security of Bond, by preventing a conveyance of the land so as to endanger or defeat his claim. The pendency of the suit, and the injunction which operated personally on Nathan Greenwald, would have the legal effect of making any conveyance by him inoperative, so far as Bond's interest was concerned. But, as between Nathan

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Greenwald and a purchaser from him, the conveyance would not be affected. *Wilhoit v. Castell*, 3 Baxter, 419; Spellings on Extraordinary Relief, Vol. 2, p. 913, Secs. 1133 and 1134.

These authorities, we think, are conclusive of the question, and the result is that the decree must be affirmed.

Fennell v. Loague.

FENNELL v. LOAGUE.

*(Jackson. June 8, 1901.)*1. ADMINISTRATOR. *Not trustee for heirs, when.*

An administrator who purchases lands of the estate sold under decree at his instance for payment of debts, at a fair price and in good faith, does not take the lands in trust for the heir, but acquires a good and perfect title.

2. SAME. *Same.*

And his adverse possession of the lands continuously for seven years, claiming them under color of such purchase, in hostility to the heir, is sufficient to vest him with a good and indefeasible title to same.

Cases cited: *Marr v. Gilliam*, 1 Cold., 491; *Duke v. Harper*, 6 Yer., 280; *Watson v. Smith*, 10 Yer., 469; *Haynes v. Swan*, 6 Heis., 560.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, J.

BERRY & ROBERTS for Fennell.

RANDOLPH & RANDOLPH and WM. FITZGERALD for
Loague.

McALISTER, J. This bill was filed to recover possession of certain real estate, situated on the southeast corner of Jackson and La Rose streets in

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the city of Memphis. The real estate in question, prior to January 4, 1883, belonged to Morris Fennell, who, on said date, departed this life intestate, leaving complainants, Maggie Fennell and Ellen Horan, who were his sisters, his only heirs at law. On January 13, 1885, John Loague, Public Administrator, was appointed and qualified administrator of the estate of Morris Fennell, deceased, and, on the following day, suggested the insolvency of said estate, and advertised for claims. Mrs. Ellen Horan filed a claim against said estate for \$350 for board, clothing and other necessities furnished the said Morris Fennell. A medical bill was also due. On April 18, 1885, Loague, as administrator, filed a bill in the Probate Court of Shelby County to sell the real estate in question to pay debts. The present complainants, Maggie Fennell and Ellen Horan, were made parties defendant to that bill. Such proceedings were had that, on August 8, 1885, said real estate was offered for sale at public vendue, when John Loague, the administrator, became the purchaser at the price of \$672. The sale was confirmed, and title divested and vested in said John Loague. Loague paid all of the purchase money, and, in 1886, caused a certified copy of the decree vesting title in him to be put of record in the Register's office of Shelby County.

The present bill charges that the estate of Morris Fennell was not insolvent, and that the filing of the Ellen Horan claim against said estate was pro-

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cured by said Loague, and was a scheme on his part to have said estate declared insolvent in order that he might get possession of this valuable real estate for a merely nominal price.

It is charged that said Loague, as administrator, was an express trustee, and could not purchase, in his own right, the property in question at said sale; that the purchase of the same by Loague was illegal, and the price he paid, \$672, was a totally inadequate consideration (said property being well worth \$4,000), and that, under said purchase, he would hold the property as trustee for the heirs of Morris Fennell, deceased.

Defendants answered, denying that said Loague was an express trustee, averring that said sale was perfectly fair and for an adequate consideration, and expressly denying all the charges of fraud. It is shown in the answer that John Loague departed this life on January 24, 1899.

Defendants, the heirs of John Loague, rely on and plead the statute of limitations of seven years. Defendants state and show that the said John Loague, after he purchased the property on August 8, 1885, took possession of the same and inclosed it with a fence, and remained in possession from said time to to the date of his death on January 24, 1899, claiming the same in fee, and his possession being open, notorious and adverse to all the world.

Defendants further aver that since the death of John Loague they have been in possession of the

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property, openly, notoriously, and adversely claiming to be the owners in fee thereof, under the will of John Loague and the conveyances to him. Defendants claim that they have become vested with an absolute estate in fee to said land, and they rely upon the statute of seven years.

We proceed to state our conclusions upon the facts found in the record: First, the charge of fraud on the part of Loague in suggesting the insolvency of the estate of said Fennell, for the purpose of procuring a sale of the real estate and purchasing it at a nominal price, is not sustained.

Second, when the property was ordered to be sold, the Court fixed a minimum price of \$400. The purchaser, John Loague, paid but \$672 for the property. This was not an inadequate price in 1885, when it was sold.

Since then the purchaser has put \$2,000 of improvements on the property. But a conclusive answer to the whole bill is that John Loague was in actual adverse possession of the property for seven years, under color of title, before suit commenced, and his heirs are absolute owners of the property.

But it is said John Loague, as administrator, was an express trustee, and is not protected by the statute of limitations. But John Loague, as administrator of the estate, was not an express trustee of its heirs in respect of the realty, and, moreover, it is well settled that, where an express trustee denies the title of his *cestui que trust*, that the statute of

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limitations begins to run from the time notice is brought home to him. Complainants are unmarried, and have known all the facts since the land was sold. Angell on Limitations, Sec. 174; *Marr v. Gilliam*, 1 Cold., 491; *Duke v. Harper*, 6 Yer., 280; *Watson v. Smith*, 10 Yer., 479; *Haynes v. Swan*, 6 Heis., 560.

The decree is affirmed.

Dewey v. Goodman.

DEWEY v. GOODMAN.

*(Jackson. June 8, 1901.)*1. **MARRIED WOMAN.** *May convey her separate estate to her husband.*

A married woman, possessing unlimited power of disposition over her separate estate, may make a valid conveyance of it to her husband. (*Post*, p. 253.)

Cases cited: *Vick v. Gower*, 92 Tenn., 391; *Peterson v. Richman*, 93 Tenn., 71.

2. **SAME.** *Privy examination may be taken by Notary Public.*

A married woman's privy examination to her deed conveying her separate real estate may be taken and certified by a Notary Public. (*Post*, p. 252.)

Act construed: Acts 1870, Ch. 71.

Case cited and distinguished: *Huff v. Glenn*, 101 Tenn., 112.

3. **SAME.** *Deed for separate estate valid without privy examination.*

A married woman's deed for her separate estate, over which she possesses unlimited power of disposition, is valid without privy examination. (*Post* p. 252.)

Cases cited: *Sherman v. Turpin*, 7 Cold., 382; *Peterson v. Richmond*, 93 Tenn., 71.

4. **SAME.** *Estoppel of.*

A married woman is estopped to reclaim her separate estate where she has conveyed same to her husband by deed reciting only a consideration of love and affection, and thereafter joins the husband in a conveyance of the same to an innocent third person, and permits her husband, in her presence, to receive the purchase price, without protest, no matter to what extent the husband may, without knowledge or participation of the purchaser, have imposed upon and defrauded her. (*Post*, pp. 252-256.)

5. **FRAUD.** *Presumption of.*

A gift to a spiritual medium by his victim is presumed fraudu-

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lent, especially where the parties bear the relation of husband and wife. (*Post*, p. 255.)

FROM SHELBY.

Appeal from the Chancery Court of Shelby County. F. H. HEISKELL, Ch.

JAMES GALLAGHER for Dewey.

L. & E. LEHMAN for Goodman.

McALISTER, J. This bill was filed by Mrs. Mary Dewey to set aside a conveyance of her separate estate, or, in the alternative, to recover from the purchaser the purchase price. The Chancellor dismissed the bill, and complainant appealed.

It is alleged in the bill that, prior to May 30, 1890, complainant was the widow of one C. H. M. Smith, and, on that date, one Mary Schoonover devised all her real property to complainant, with the limitation that, upon her marriage, she should hold the devised property to her sole and separate use free from the debts, contracts, or control of her husband. Mrs. Schoonover devised to complainant Lot 4, Block 47, in Memphis, Tennessee. It is then alleged that, prior to the decease of Mrs. Schoonover, she and complainant lived together and became acquainted with Dewey, who claimed to be a physi-

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cian and spiritual medium, and had induced the two ladies to believe in his manifestations.

It is further alleged that, on December 1, 1890, complainant entered into an ante-nuptial contract with Dewey, whereby he settled on her all her property, to her sole and separate use, free from the contracts, liabilities, or control of said Dewey, with full power to her, the said Mary, to dispose of it by will, deed, mortgage, or other conveyance, as a *feme sole*. The ante-nuptial contract was duly acknowledged and recorded.

The bill further recites that, on December 2, 1890, complainant intermarried with the said Charles B. Dewey. It is alleged that, soon after the marriage, Dewey became extravagant and wasted complainant's money and means, and that in a short time Dewey induced complainant to execute a conveyance of her property to him promising to pay her therefor \$3,000, and that she executed the deed to him on January 27, 1891, retaining a lien for \$3,000. The deed recites that it is made "in consideration of the love and affection she bears her beloved husband, Charles B. Dewey." It appears that the deed was executed on a printed blank containing these words, "A lien is hereby expressly retained on the above described property in favor of the said Mary Dewey, her heirs, representatives and assigns, to secure the deferred payments of the purchase money, and should any of the future payments not be discharged when due, then the notes not then

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due on their face shall immediately become due and _____, of Memphis, Tennessee, as trustee, after giving notice for thirty days in some newspaper published in Memphis, Tennessee, of the time, term and place of sale, together with the description of the property, proceed to sell such property to the highest bidder for cash, free from the equity of redemption, and applying the proceeds, (first) to the payment of the costs and expenses, (second) to the payment of the purchase money that may be due, with legal interest from the date thereof, and (third) pay over the residue, if any, to the said _____.

It appears that the deed from Mary Dewey to her husband was duly acknowledged by complainant, with privy examination before H. Battenberg, a Notary Public for Shelby County, and was duly recorded February 2, 1891.

It is alleged that the omission of the purchase money, the name of the trustees, and the execution of the notes from the deed was the result of the fraud and contrivance of the said Charles B. Dewey. It is then alleged that on March 6, 1891, complainant was induced, by the fraud and contrivance of her said husband, to sign and acknowledge the execution of a deed to the defendant, Joseph Goodman, of the land devised to complainant by Mrs. Schoonover, upon the promise and understanding that complainant should recover from the proceeds of such sale the sum of \$3,000, which her husband had agreed to give her

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in the conveyance made to him on January 27, 1891, and that it was agreed further with her husband that the deed to Goodman should not be delivered until she had received the said \$3,000. The deed to Goodman, which was signed by complainant and her husband, acknowledged the payment of the purchase money, to wit, the sum of \$5,000, to complainant and her husband. This deed was acknowledged by complainant and her husband before John E. Kelly, Deputy Clerk of the County Court, on March 5, 1891, with privy examination of the wife.

Complainant charges in her bill that the consideration expressed in the deed, of \$5,000, was not received by her and her husband, and that she had never received any part thereof whatever. It is further alleged in the bill that, in the year 1894 or 1895, complainant's husband, the said Charles B. Dewey, had abandoned her, and had not since lived with her. It is further charged, viz., "that if complainant's conveyance to her husband be valid that when she executed the deed to Goodman she had a valid lien on the property for the purchase money, to wit, \$3,000, and that the failure of Goodman to pay the lien debt to complainant in person was no discharge of the lien, and that it is still a valid and subsisting lien against the land. (2) Complainant charges that, if her deed to her husband was invalid and no lien was retained for purchase money, then her other deed is void for want of delivery by her.

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(3) That if both deeds were valid, payment of the \$5,000 purchase money by Goodman to her husband was not a good and valid payment to her; and that, as defendant Goodman claims title under the will of Mrs. Schoonover and said deeds, he is estopped from disputing complainant's title to recover the purchase money, otherwise the will and devise of Mrs. Schoonover and the marriage contract would be defeated, and, with these aspects, complainant prays to maintain this bill."

The prayer of the bill is that complainant be allowed a decree for the purchase money under either of the said two deeds with a lien on the land, or that she recover the land in specie, with an account of any change in the property "detracting or enhancing its value and the rent thereof."

Defendant demurred to the bill assigning, among other causes, the following, to wit: It appears from the bill that complainant owned, as her separate estate, the land described therein, and by deed dated January 27, 1891, duly acknowledged by her with privy examination, in consideration of love and affection, conveyed said land to her husband, and that thereafter she and her husband by joint deed, which was also acknowledged by both of them, with like privy examination of complainant, conveyed the land to defendant for \$5,000; but that there was a private understanding between complainant and her husband that the latter should pay her \$3,000 out of the \$5,000, which her husband did not do, upon

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which showing complainant is entitled to no relief against defendant. Other causes of demurrer were assigned.

The demurrer was overruled.

The defendant, Goodman, then answered the bill, and avers he had at no time any business transaction, association or acquaintance with Dewey, except in the purchase of said land, and no knowledge of any fraud practiced by the said Dewey upon the complainant. Defendant avers he was introduced to complainant and her husband by a real estate agent, and that he paid \$5,000 in cash for the property in the presence of both complainant and her husband at the time of the delivery of the deed. That immediately after the execution of the deed and the payment of the consideration defendant took possession of the land and that he has been in possession ever since. Defendant avers that the purchase money of \$5,000 was paid over to Dewey in the presence of the complainant, and with her full knowledge and consent, and that she made no question as to the validity or propriety of such payment. Moreover, that her husband, the said Dewey, paid over to her at the time a part of the consideration. Defendant then relies upon a plea of innocent purchaser. He further shows that, after he had paid for the land, he expended \$9,000 in improvements thereon, and that this money was expended with the knowledge of complainant, who stood by and saw him expend the money without

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making any claim to the property, and that the present bill is filed nine years after his purchase, and defendant insists that complainant has by her laches estopped herself from claiming any relief herein.

Complainant afterward filed an amended bill, in which she charged that the Notary Public who took her acknowledgment of the deed executed to her husband had no authority to take her privy examination because he was not an officer designated and empowered by law to take such an acknowledgment. Complainant in this amended bill also attacks the authority of John E. Kelly, as Deputy County Court Clerk, to take the complainant's privy examination in the deed executed by her, jointly with her husband, to the defendant Goodman.

This demurrer was also overruled. Proof was taken, and on the final hearing the Chancellor dismissed the bill, and complainant appealed.

The first assignment of errors is that the deed from complainant to her husband, the said Charles B. Dewey, executed on January 27, 1891, was void for want of authority in the Notary Public to take Mrs. Dewey's acknowledgment and privy examination. The insistence is it should have been taken by a Chancellor, Circuit Judge or Clerk of the County Court. This assignment of error is based upon the authority of *Huff v. Glenn*, 17 Pickle, 112. The will of Mrs. Mary Shoonover, after devising the property to complainant, provided that "should she

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ever marry she shall hold all of my property, real and personal, to her sole and separate use, free from the debts or control of any husband."

In addition to the provision of the will, it appears that on December 1, 1890, complainant entered into an ante-nuptial contract with Dewey whereby he settled on her all her property "to her sole and separate use, free from contracts, liabilities or control of said Dewey, with full power to her, said Mary, to dispose of it by will, deed, mortgage or other conveyance, as a *feme sole*." Under the terms of her ante-nuptial settlement, the wife could have conveyed her real estate without privy examination. *Sherman v. Turpin*, 7 Cold., 382; *Peterson v. Richman*, 9 Pickle, 71.

In the present case the privy examination of the wife was taken by a Notary Public and it is insisted that it should have been taken by a Chancellor, Circuit Judge, or Clerk of the County Court, as required by Sec. 2, Chap. 99, Acts of 1869-70. This contention is not well made. The authority of a Notary Public to take such privy examination was expressly conferred by Sec. 1, Chap. 71, of the Acts of 1870. Under this Act Notaries Public have all the powers in respect to taking acknowledgments that are given by existing laws to County Court Clerks. *Daly v. Hamilton Assn.*, 48 S. W. R., 117.

The second assignment of error is that if the validity of the deed from complainant to her husband

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be conceded the Chancellor erred in not enforcing the express lien for purchase money reserved by the wife. In answer to this assignment it may be said that there is no recital in the deed of any money consideration, but the consideration is love and affection. The land was the wife's separate estate, and her conveyance thereof to her husband with privy examination vested the title to the land in the husband. *Vick v. Gower*, 92 Tenn., 391.

Thereafter the complainant, by joint deed with her husband, which she acknowledged with privy examination, conveyed the land to defendant Goodman.

Complainant herself admits she never spoke to Goodman before the deed was delivered to him, and never told him of the agreement between herself and husband that she was to get \$3,000 of the purchase money, and she admits that, so far as she knew, Goodman was ignorant of any such agreement. The proof shows that the purchase money was paid by Goodman to Dewey in the presence of complainant and with her implied acquiescence and consent, and that she made no objection to anything that was done. There is no proof in the record whatever that defendant Goodman knew that complainant claimed a secret lien on this land for purchase money due from her husband, and complainant having joined in the conveyance to Goodman and having seen the purchase price paid to her husband without asserting any such claim is now estopped to make it as against defendant.

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The third assignment is that Dewey practiced a fraud upon Complainant in procuring a deed to her real estate worth \$5,000, for mere love and affection and that defendant Goodman was charged with knowledge of the fraud. The bill alledged that Complainant was of unsound mind when she executed the two deeds of which fact the defendant had knowledge.

The Notary Public who took the acknowledgment and who had known the Complainant for some time testified that she was entirely at herself when she acknowledged the deed. Complainants' counsel admits in his brief the proof fails to show Complainant was *non compos mentis* at the time of the trade, but his claim is that she was a person of weak mind and was terrorized by her husband's extraordinary feats in spiritualism.

The Notary testified that Mrs. Dewey had at a previous time consulted him about the advisability of transferring her property to her husband. The witness commenced to speak in English when Mrs. Dewey interrupted him telling him not to speak in English that Waumeeka, her husband's spirit, was listening and would communicate to him everything that might be said. The Notary advised Mrs. Dewey not to transfer the property to her husband, but it appears that she did not heed his advice. Complainant testified that her husband would get in a trance and remain in such state a whole hour at a time; that he professed to communicate with the

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spirits of the dead, that he had little dolls and canoes representing spirits; he claimed that these toys guided him and put him in a trance; that one of the little dolls represented Waumeeke, a dead Indian queen; he professed to talk to Waumeeke; he would cover himself with blankets and sit in the corner playing Indian, and at other times would carry on an Indian war fight. Complainant claims that these capers alarmed her and kept her in a constant state of trepidation; that with her husband as a medium she could not help but believe in spiritualism, and in this way he obtained absolute dominion and control over her and abused the confidence reposed. As an evidence of her husband's extravagance complainant states that after their marriage he invested \$75 in different varieties of birds; that he purchased them simply for his own amusement and kept them on the southern porch of the house. It was held in *Lyon v. Horne*, L. R., 6 Eq. 655 that a presumption of fraud would arise where it appeared that a spiritual medium had obtained the confidence of one whom he had induced to believe in his manifestations. This presumption is of course much stronger where the relation of husband and wife subsists and the wife has been induced to part with her separate estate.

But while this principle would apply between husband and wife in a suit for rescission for fraud and undue influence, it can have no application in the suit of the wife against a third party who is

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not shown to have had any knowledge of the abuse of confidence reposed by the wife in her husband or any knowledge that fraud was practiced or undue advantage taken. Moreover the proof shows that after all these alleged fraudulent transactions complainant joined her husband in a deed conveying the property to defendant and permitted the purchase money to be paid to him. The purchaser has expended \$8,000 in the improvement of the lot and the present bill was not filed until nine years after the purchase.

The decree of the Chancellor dismissing the bill is affirmed.

Carroll v. Alsup.

CARROLL v. ALSUP.

*(Jackson. June 8, 1901.)*1. CONSTITUTIONAL LAW. *Title and subject of general assessment act.*

A statute is not objectionable as embracing more than one subject, or as embracing matter not covered by its title, which, under the title, "An Act to provide more just and equitable laws for the assessment and collection of revenue for State, county, and municipal purposes," etc., enacts, for the assessment of quasi public and manufacturing corporations, a method of assessment different from that applied to other classes of corporations, in that the shares of stock of the former classes of corporations are not to be assessed to stockholders, compensation for the difference being made in the manner of assessing the properties of the companies. (*Post*, pp. 266, 267.)

Act construed: Acts 1899, Ch. 435.

Cases cited and approved: *State v. Brown*, 103, Tenn., 450; *State v. Yardley*, 95 Tenn., 546.

Cited and distinguished: *State v. McCann*, 4 Lea, 1; *Murphy v. State*, 9 Lea, 373; *Mayor v. Lewis*, 12 Lea, 180; *Ragio v. State*, 86 Tenn., 273; *Hyman v. State*, 87 Tenn., 109; *Bank v. Devine Gro. Co.*, 97 Tenn., 604; *Kennedy v. Montgomery County*, 98 Tenn., 165.

2. SAME. *Assessment act not vicious as class legislation, when.*

A general assessment law is not vicious as class legislation which provides a method for the assessment of quasi public and manufacturing corporations different from that applied to other classes of corporations, especially where there are palpable reasons apparent for such classification. (*Post*, pp. 267, 268.)

Act construed: Acts 1899, Ch. 435.

Cases cited and approved: *Railroad v. Harris*, 99 Tenn., 684; *Bank v. Memphis*, 101 Tenn., 154.

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3. TAXATION. *Method of assessing corporations.*

A provision in a general assessment law does not create an unlawful exemption from taxation, but only prescribes a peculiar, but valid, method of assessment, which directs, as to quasi public and manufacturing corporations, that their corporate property, including their franchises, easements, incorporeal rights, and privileges, shall be assessed at actual cash value, not to be less than the actual cash value of both the shares of stock and bonded debt, and declaring that this shall be in lieu of the assessment of the shares to either the corporation or its stockholders. (*Post*, pp. 267-269.)

Act construed: Acts 1899, Ch. 435.

4. SAME. *State Board of Equalization.*

The State Board of Equalization does not lose the power to complete its work in equalizing the taxes of a county by returning the assessment roll, pending the consideration of a county, to the County Court Clerk, for a temporary purpose, and the board may, in such case, recall the roll and complete its work. (*Post*, p. 269.)

Act construed: Acts 1899, Ch. 435.

5. SAME. *Same.*

Under the assessment law of 1899 the State Board of Equalization is composed of three members, a majority of whom is made a quorum, and hence the presence and concurrence of two members, at a regular meeting, are sufficient to render its action valid, and the presence at such meeting of a third person, as substitute for the absent member, does not vitiate the action of the board, especially when it does not appear that he exercised any control over the decision reached. (*Post*, pp. 269-273.)

Act construed: Acts 1899, Ch. 435.

Cases cited: *Cowan v. Murch*, 97 Tenn., 590; *Austin v. Harbin*, 95 Tenn., 600; *Radford Trust Co. v. Memphis Lumber Co.*, 92 Tenn., 136.

6. SAME. *Same.*

Under the assessment law of 1899 the State Board of Equalization is invested, not only with the power to equalize taxes among the counties, civil districts, etc., but also with the power to increase or decrease the valuations of the property

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of individual taxpayers in order to equalize the distribution of the public burdens. (*Post*, p. 274.)

Act construed: Act 1899. Ch. 435.

7. SAME. *Same.*

The State Board of Equalization may, at its biennial sessions, without infringement of any constitutional right of the taxpayer, increase or decrease the valuation of his property, for the purpose of equalization, without giving him any notice other than that afforded by the following provision of the assessment law of 1899, to wit: "Taxpayers and property owners, without further notice than this Act, are required to take notice of such biennial session. At this biennial session the assessment of the entire property of the State, and every taxpayer in it, is to be considered and passed upon, and the action of the board becomes, when taken, a finality." (*Post*, pp. 274-282.)

Act construed: Acts 1899, Ch. 435.

8. SAME. *Basis of valuations.*

The Constitution of 1870 requires property to be assessed for taxation at its actual cash value, and does not permit assessment at any per cent. of value below one hundred per cent. It requires equality and uniformity on the plane of actual cash value. "The actual cash value is the only practicable basis upon which taxes can be made equal and uniform, and this is clearly the constitutional requirement, the legislative intent, and should be the effort of the Court as well as taxpayers." (*Post* pp. 282-293.)

Constitution construed: Art. II., Sec. 28.

Cases cited and approved: *Brown v. Greer*, 3 Head, 696; *Chattanooga v. Railroad*, 7 Lea, 569; *State v. Butler*, 11 Lea, 410; *Railway v. Morrow*, 87 Tenn., 415; *Ellis v. Railroad*, 8 Bax., 531; *Jenkins v. Ewin*, 8 Heis., 458.

Cited and distinguished: *Reelfoot Lake v. Dawson*, 97 Tenn., 160.

9. SAME. *Same.*

Beyond all controversy, the assessment law of 1899 fixes "actual cash value" as the basis of assessments to be made thereunder. It defines "actual cash value" as the amount of money the property would bring if sold at a fair, voluntary sale. (*Post*, pp. 290, 291.)

Act construed: Acts 1899, Ch. 435.)

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10. SAME. *Same.*

It is competent for the Legislature to prescribe in an assessment law any reasonable method or rule for the ascertainment of actual cash value. (*Post*, p. 290.)

11. SAME. *Taxpayer's remedy for disproportionate assessment.*

A taxpayer whose property has not been assessed at more than its actual cash value, as required by the Constitution and laws, cannot obtain any abatement of his assessment, except in very exceptional cases, by reason of the fact that other taxpayers have been assessed upon an inadequate valuation. The legal remedy in such cases is to raise the inadequate assessments, not to lower those made according to law. (*Post*, pp. 290-293.)

FROM SHELBY.

Appeal from the Chancery Court of Shelby County. F. H. HEISKELL, J.

T. B. TURLEY and K. D. McKELLAR for Carroll.

Attorney-General PICKLE for Alsup.

WILKES, J. This is a bill to recover taxes paid the State and County under protest and to set aside an assessment of property for taxation. The bill was demurred to; the demurrer was sustained, and the bill dismissed without any relief, and complainant has appealed and assigned errors.

The bill alleges, in substance, that complainant owns real estate in Shelby County for which he gave, at public sale, \$12,200; which at that time

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was its actual cash value; that prior to 1900 it was assessed for taxation at \$13,000, which was in excess of its actual cash value and these taxes were paid without objection; that under Chapter 435, of the Acts of 1899, this property was assessed at \$12,000 or \$13,000 and upon complainant's application to the County Board of Equalization this valuation was reduced to \$10,000; that after this the assessment roll of the County of Shelby was transmitted, as the law requires, to the State Board of Equalization at the capital of the State to the end that the assessment of property in the several Counties of the State should be equalized. The bill charges that this State Board had jurisdiction to classify the assessments in the several Counties by wards and districts, or in such manner as the Board might deem best to enable it justly and equitably equalize assessments in conformity to the standard of the actual cash value of the property that appeared upon the assessment rolls of the several Counties of the State; that this Board was a quasi judicial tribunal composed of the Secretary of State, Comptroller, and Treasurer, and that they were vested by the Act with judicial functions and their jurisdiction limited and defined by the terms of the Act; that the statute provides that all persons shall take notice of the biennial sessions of the Board and does not provide for any other notice; that the law requires the duties of the Board to be performed by the Treasurer, Secretary of State, and

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Comptroller, and that it is not in the power of either of said officers to appoint a substitute to act for and in his stead, but that the Treasurer of the State did appoint in his stead to act for and in his behalf a distinguished citizen of Tennessee whose capacity and integrity is admitted, the Hon. Newton H. White, the present Speaker of the Senate, and that at each and every session of the Board the said White attended and passed judgment upon each and every question coming before the Board, and that this was unauthorized and renders all proceedings by said Board illegal and void; that when the assessment roll was forwarded to the State Board, two members of the Board with said White considered the same, and the Comptroller and said White came to Memphis seeking information, as the Board was, by law, authorized to do, and thereafter the Board of Equalization convened in the capitol at Nashville and considered all the assessments of the properties in the County of Shelby and took action thereon, increasing some assessments, *but leaving the assessment of real estate untouched*, and after making corrections and changes and proper certificates, they certified their action to the Clerk of the County Court of Shelby County to enable him to make proper entries on the tax books to be turned over to the County Trustee of the County of Shelby.

The bill further alleges that thereafter the State Board recalled the record so certified, and had the same returned to it at Nashville, and that such

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action, on the motion of the Board or some of its members, was unwarranted and unauthorized, and beyond the jurisdiction of the Board; that the assessment on complainant's property, without notice to him, was raised from \$10,000 to \$10,500, without authority or jurisdiction, and that the provision of the Act, allowing such changes and increase in valuation without notice to the owner, and making such action final, is unconstitutional and void, and not due process of law, and is repugnant to the Constitution of the United States and the State of Tennessee.

The bill further avers that it was not competent for the State Board, after having taken action, and leaving untouched the real estate in Shelby County, and certifying the roll to the Clerk of the County Court, to take any other or further action, except upon such proceeding by a taxpayer in the form of a verified petition, asking for a revision of the quasi judicial action of the members of the Board in making an erroneous assessment of his property, and seeking a rehearing of its judgment; that the roll became a finality when acted upon by the Board and returned to the County Court Clerk, and could not be changed on mere motion of the Board, without notice to the taxpayer.

The allegations of the bill in regard to values are, in substance, these: That property specified in Section 22 of the Act is assessed at forty per cent. of its value; that real estate is assessed at

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from seventy to eighty per cent. of its value; that the property specified in Section 28 is assessed at forty per cent., and that railroad property is assessed by the Railroad Commissioners at sixty per cent. of its value, and that he is entitled to an assessment of his property on an equal and uniform basis with other property; that \$7,200, or sixty per cent. of the cash value of his property, would put it on such equal and uniform basis and parity with other property in Shelby County and in the State, and that he tendered taxes on this basis, which the Trustee declined to receive. He then tendered taxes upon the property at a valuation of \$10,000, which was the valuation fixed by the County Board of Equalization, which was also refused, and he thereupon paid, under protest, upon a valuation of \$10,500, the amount fixed by the State Board of Equalization, and brought this suit.

It will then be seen that the complainant in this bill treats \$12,000 as the actual cash value of his property, which was assessed at \$10,500 by the State Board of Equalization, or not quite 90 per cent. of its actual cash value. He states that at public sale he gave for this property \$12,200 and that was the actual cash value of it when he bought it. The bill further alleges that upon this assessment the city of Memphis will collect taxes for 1901 and 1902, and defendant Alsup is *ex-officio* collector of these taxes and will proceed to collect upon this assessment. It further charges that the

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Act is unconstitutional in that it embraces two separate subjects and they are not expressed in the caption; that is by Sections 22 and 23 shares of stock in quasi public and industrial corporations are exempt from taxation, whereas the title and body of the Act is to provide revenue and for equal and unit form assessment of property for taxation.

The prayer is that the assessment of \$10,500 be declared illegal and void because repugnant to Section 8, Article 11, of the Constitution and to Section 17 of Article 2, and that he have judgment for the taxes paid by him and that the assessment be cancelled and set aside and that he have such other and further relief as may be equitable and proper under the facts general and special.

The demurrer is in substance:

1. That the complainant having by this bill shown that his property is assessed at less than its actual cash value, has no status, and cannot complain of the assessment merely because other property of other owners is assessed at a still lower valuation.

2. That the notice provided by the statute is all the notice to which the complainant or any other property owner is entitled.

3. That the State Board had the jurisdiction to raise the assessment of real estate as it did, and to consider and pass upon the tax assessment for Shelby County as it did.

4. That the bill shows that when the action of the State Board was had it was acquiesced in and

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done by the Board, and even if done by a majority of the Board, the presence and action of the Hon. Newton H. White, a private citizen, did not and could not invalidate the action of the Board or a majority.

5. That the Act does not embrace two subjects, but only one general subject, and the provision complained of is one prescribing a mode of making an equal and uniform assessment; and the Act is not, therefore, unconstitutional and void.

The decree of the Chancellor recites that the several assignments of demurrer are well taken.

The first assignment of error is in substance that the Act in controversy, being Chapter 435 of the Acts of 1899, is repugnant to Section 17, Article 2 of the Constitution of the State, in that it embraces two separate and distinct subjects, to wit, (1) the assessment and collection of revenue, and (2) the exemption of a certain class of property from taxation.

The title of the Act is: "An Act to provide more just and equitable laws for the assessment and collection of revenue for State, county, and municipal purposes, and to repeal all laws in conflict with the provisions of this Act, whereby revenue is collected from the assessment of real estate, property, privileges, and polls." In support of this assignment are cited the following cases: *State v. McCann*, 4 Lea, 1; *Murphy v. State*, 9 Lea, 373; *Mayor v. Lewis*, 12 Lea, 180; *Ragio v. State*, 86

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Tenn., 273; *Hyman v. State*, 87 Tenn., 109; *Bank v. Devine Gro. Co.*, 97 Tenn., 604; *Kennedy v. Montgomery Co.*, 98 Tenn., 165.

Without commenting upon these cases, we are of opinion that the present Act does not embrace two separate and distinct subjects, but only the general and broad subject of the just and equitable assessment and collection of State, county, and municipal taxes; that this broad subject, expressed in the title, covers all the provisions of the Act, including the manner of assessing property of corporations, and the matters complained of as exemptions are, in fact, only different methods of taxing the property of different corporations. *State v. Brown*, 103 Tenn., 450; *State v. Yardly*, 95 Tenn., 546.

Closely connected with the first assignment is the second one, which is, in substance, that the Act violates that provision of the Constitution which prohibits special and class legislation. Coupled with this, also, is the third assignment, that the Legislature had no power to exempt shares of stock in quasi public and manufacturing corporations from taxation while it taxes the shares in other corporations; and that this Act makes such exemptions, and that the provisions relating thereto are so interwoven and interdependent on other provisions as to render the whole Act void.

We are of opinion that these assignments are not well made. What is called in the bill and brief of counsel an exemption of the shares of stock of

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quasi public and manufacturing corporations is not, in fact, an exemption, but only a different mode of assessment, rendered necessary by the different characters of the corporations to be taxed. While the shares of stockholders in such quasi public and manufacturing corporations are not taxed, the corporate property of such corporations is taxed, including their franchises, easements, incorporeal rights and privileges, and all other corporate property, at its actual cash value, which, it is provided, shall not be less than the actual cash value of both its shares of stock and bonded debt, and this shall be in lieu of the assessment and taxation of the shares of stock either to the corporation or the stockholders; provision is then made for the taxation of the real estate and tangible personalty, and other specific directions follow as to the manner in which the assessment shall be made and the taxation shall be laid. Secs. 22 and 23, Acts of 1899, p. 1098 to 1103.

It has been found necessary to provide different modes for the assessment and taxation of different classes of property belonging to different kinds of corporations, and even different kinds of property belonging to individuals, and such instances of difference in modes is frequently met with. Thus railroads, which do not pay an *ad valorem* tax, are required by law to pay a privilege tax. *Railroad v. Harris*, 15 Pickle, 684. Banks are taxed differently to avoid the exemptions contained in their charters.

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Bank v. Memphis, 17 Pickle, 154. And many other similar illustrations could be given.

It is said that after the State Board had once considered the Shelby County assessment and certified its conclusions to the Clerk of the County Court, its power and jurisdiction was exhausted, especially in the absence of notice to property owners.

As we understand the allegations of the bill they are that the State Board, upon their first consideration of assessments of Shelby County property, *left the assessments of real estate untouched*, and this, we think, means that the assessments were not considered, so far as real estate was concerned, and, while the action of the Board in returning the roll before their work was entirely completed, may have been irregular, still we cannot see that the Board exhausted its power until after it had fully acted upon the assessment of real estate as well as other property, and we think the reasonable inference is that their action was a mere matter of convenience, and not intended as a finality and conclusion of their labors during their sitting, the assessment was entirely under their control so long as it was desired by them to complete their labors and discharge their duties relating to it.

It is next insisted that the entire action of the Board is illegal and void because of the presence of the Hon. Newton H. White upon the Board as a substitute for and in lieu of the State Treasurer, the Hon. E. B. Craig. The allegations of the bill

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are somewhat indefinite as to this feature of the case, and, perhaps, do not fairly raise the question intended to be presented.

No imputation is made against the capacity and integrity of Mr. White. These are expressly conceded by the bill. It is alleged that he was appointed by the Treasurer to act in his stead, and that he attended each and every session of the Board, and passed judgment on each and every question coming before the Board and also that he visited the city of Memphis with the Comptroller seeking information. The bill does not allege that he was present and participated in the consideration of the Shelby County assessment nor that the Treasurer was not present at the time it was made; on the contrary, if taken literally, the language would imply that the Treasurer was present and that Mr. White was not, as the bill states that the Board of Equalization convened at Nashville and considered of the assessments and took action thereon without specifically stating that Mr. White was present and that Mr. Craig was not, on that particular occasion. But treating the bill as alleging as was probably intended that Mr. White was present and Mr. Craig was not, the question recurs, does this render the action of the Board, or a majority of the Board, void?

There is no allegation that a quorum of the properly constituted Board did not act, nor indeed that those who acted did not do so unanimously.

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The question of the legality and validity of the action of a majority of a Board or of a Court was fully considered in the case of *Cowan v. Murch*, 13 Pickle 590, and the authorities are there cited and commented upon.

The rules there laid down are, that when power is delegated to two or more persons for a mere private purpose in no respect affecting the public, it is necessary that all should join in the execution of it, thus arbitrators must all join in an award, but in matters of public concern if all are present, the majority may act for the whole, citing *McCoy v. Curtice*, 9 Wend., 17 (S. C. 24 Am. Dec., 115 and note); *Cooley v. O'Conner*, 79 U. S. Report, 396; *Croker v. Crane*, 21 Wend., 211; *Ex Parte, Rogers*, 7 Cowen, 529 (S. C. 34 Am. Dec., 235 and note); *Bank v. Mount Taber*, 52 Ver., 87 (S. C. 36 Am. Report, 734), and other cases.

A more explicit statement of the rule is: that generally when a body or board of officers is constituted by law to perform a trust for the public, or execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done—the act of the majority is the act of the body. 19 Am. & Eng. Ency. (1st Ed.), 465, and note.

Some cases hold that all must confer, but if all have notice of the time and place of meeting it is no objection that all do not attend if there be a quorum, and the presence of all will be presumed.

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unless the contrary appears. If the statute conferring the power requires the presence of all, then all must be present. 19 Am. & Eng. Ency. Law (1st Ed.), 466, and note.

But the same rule does not apply in cases of officers exercising judicial functions. In such cases a majority may act. *Radford Trust Co. v. Memphis Lum. Co.*, 8 Pickle, 136; *Austin v. Harbin*, 11 Pickle, 600; *Cowan v. Murch*, 13 Pickle, 590.

The cases which hold that all must act, and a majority cannot, so far as we can ascertain relate to matters of private interest, or where the statute or acts delegating the authority does not expressly provide that the act of the majority shall be sufficient; we have been cited to no authority which holds that all must join when the statute prescribes that a majority may act, and in such case the statute controls and a majority may act, and this has been held to apply to Boards of Equalization. *Cooley v. O'Conner*, 12, Wall, U. S., 396; *People v. Lothiop*, 3 Colo., 428; *Conner v. Waxahatchie*, 13 S. W., Rep., 30; *Ferriss v. Kenble*, 75 Texas, 476; *Hamilton v. State*, 3 Ind., 452; 25 Am. & Eng. Enc. L. (1st Ed.), 247.

If the office and duty of the Board be considered as ministerial instead of judicial or quasi judicial, then a majority may without question act and the authority of any one may be delegated. 19 Am. & Eng. Enc. L., (1st Ed.), 462 and note.

Our statute, Shannon, Sec. 69, provides that "all

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words giving a joint authority to three or more persons or officers gives such authority to a majority of such persons or officers unless it is otherwise declared.”

It is held in *Cowan v. Murch*, 13 Pickle, 590, that while this section by its terms and context is applicable alone to the Code and the body of laws embraced in it; it should be considered in the construction of all subsequent statutes so as to build up a uniform and harmonious system.

But any doubt on the right of the majority to act in this case is put at rest by the first subsection of Section 39 of the Act in question, which provides that a majority of the Board shall constitute a quorum for the transaction of business. It is said, however, that even if it be true that a majority may act, the statute does not authorize joint action with a third person, no matter who he may be. But we cannot see how this can affect the action of the majority, if it be true. They would have the right to call to their aid the services of any competent citizen as advisory, and his counsel and act would not vitiate the conclusion of the majority. It will be noted, however, that there is no express charge that Mr. White took any part in raising the assessment, but the inference from the language used is that he did not. There is no allegation that it was done on his advice or suggestion, or that he signed the assessment as made.

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The eighth assignment of error raises two questions, or rather a question in a double aspect, and may be thus stated, that it was not the intention of the General Assembly to confer power upon the State Board of Equalizers to increase or decrease the valuation of the property of individual taxpayers, but merely to equalize assessments as between the several counties in the State, so that the property in the several counties should be placed on the same basis.

So far as this feature of the assessment goes, we think it not well taken, for the act clearly contemplates and provides that the Board shall have the power to pass upon and consider individual assessments, and increase or decrease them as in its judgment may appear right and proper. This appears from many sections and provisions of the act which we need not mention.

It is said that, conceding this to be true, the Act must be held to be unconstitutional and void because it wholly fails to provide for notice to the property owner to be affected by the act of the Board and give him an opportunity of being heard, before the Board passes upon the value of his property as a finality, and thus the taxpayer is encumbered with a burden and his property taken without due process of law, contrary to the Constitution.

The Act provides for a biennial session of the Board to be holden the second Monday in July and

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continue until the 15th of September following, and the only provision for notice is as follows: "Taxpayers and property owners without further notice than this Act, are required to take notice of such biennial session. At this biennial session the assessment of the entire property of the State and every taxpayer in it is to be considered and passed upon, and the action of the Board becomes, when taken, a finality."

The only express provision we find in the Act for hearing complainants of the individual taxpayer is contained in the sixth subsection of Section 39, and that pertains only to persons who desire to complain that their neighbors or third persons have not been adequately assessed.

Therefore if the Board shall find the property of any county, district, ward, or citizen in any County in the State in their opinion not adequately assessed, it may, without further notice than the Act itself provides, proceed to raise such property to such assessment as in its judgment reaches its actual cash value.

When the Board undertakes to fix this actual value, the property owner, under the Act, is not notified to appear, and this is true whether the assessment is that of a county, district, individual, or corporation.

The taxpayer knows that the Board is in session, it is true, for the act so notifies him, but he does not know when it will consider the assessment nor

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whether it will attempt to make any change in it. The argument is that granting that he might have the privilege of attending all the meetings of the Board and listening to all their deliberations he might by remaining with the Board for the two and a half months it is in actual session, obtain actual notice that the Board did or did not raise his assessment, but this is the only way he could have such notice as the Board is under no express requirement of law to notify him whether his property will be raised, nor indeed at what time its valuation will be considered, literally the act prescribes that all property owners shall by the act itself have notice of the biennial meetings of the the Board, but it does not provide that by the act itself each taxpayer shall have notice of all that transpires in the Board, nor of anything that directly touches or affects his property.

It is said that it would be impracticable to give each taxpayer notice; that the number to be investigated and the space of time in which they are to be considered is too great to allow notice in each case. The argument is pressed to the conclusion that to hold the general notice provided by the act to be sufficient to warn each property owner in the State to be on the alert to see that his assessment which has passed the scrutiny and action of the assessor and County Board, may be increased, nevertheless, by the State Board, and that he must take notice thereof without further notification than the

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provisions of the act itself, is virtually to say that each and every taxpayer in the State must at his peril attend the meetings of the Board at Nashville for the entire time of two and a half months the Board is in session, in order that each may see that no change in his assessment is made.

Numerous cases are cited as sustaining the contention that notice must be given and that a general notice, such as provided by the present Act, is not sufficient, but some notice must be provided by the Act itself to be given to each individual taxpayer or property owner, and in the absence of any provision for such notice in the Act the Act itself would be unconstitutional and void, because it would impose a tax burden and thus take away the property of the owner without due process of law; and this is undoubtedly the holding of some States and authorities. We cite a number of these, and, no doubt, others can be collated. *Kuntz v. Sumption*, 2 L. R. A., 655, a case from Indiana; *Hager v. Reclamation Dist.*, 111 U. S., 701; *Sioux City v. Washington Co.*, 3 Neb., 30; *South Platte Land Co. v. Buffalo Co.*, 7 Neb., 253.; *McGee v. The State*, 49 N. W. Rep., 220; *Patton v. Green*, 13 Cal., 325.

Other authorities hold a different view, and we are satisfied from them and reason that the notice prescribed by the statute is sufficient to warrant the action of the Board. Indeed, it is difficult to see how any other notice could be so effectual or suit-

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able. The primary function of the Board is to equalize assessments as between counties, so that assessments may be uniform and equal throughout the State. If the Board finds it necessary to raise an assessment on any county, it is difficult to see what other, better or further notice could be required or given than that prescribed by the act. There is no individual to whom such notice could be directed as representing the county, and why an individual should have notice of a change in his assessment, when no notice is required to be given to the body of taxpayers in the county, it is difficult to see. It must be conceded that tax proceedings, and especially assessments, are *sui generis* and do not require that strictness as in controversies between individuals, and the authorities hold that notice given in the act itself is sufficient. Cooley on Taxation, p. 364-52 (2d Ed.); 1 Desty on Taxation, p. 599-602; State Railroad Tax Cases, 92 U. S., 575-609; Kentucky Railroad Tax Cases, 115 U. S., 321; *St. L. I. M. & S. R. R. v. Northern*, 7 L. R. A., 374; *C. C. C. & St. L. R. R. v. Backus*, 18 L. R. A., 729; 25 Am. & Eng. Enc. Law, 254 and notes. When authorities *pro* and *con.* are collated, 25 Am. & Eng. Enc. Law, 547, note 1.

In Cooley on Taxation (2d E.), p. 364-5, it is said, of the meeting of the Court or Board, the taxpayer must in some manner be informed, either by personal notice or by some general notice which is reasonably certain to reach him, or what is equiva-

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lent, by some general law which fixes a time and place of meeting, and of which he must take notice. The last is a common method of bringing the assessments to the notice of taxpayers, and it is, perhaps, the best of all, because it comes to be generally understood and is remembered. See, also, *Meth. Church v. Baltimore*, 6 Gill., 391; *O'Neil v. Bridge Co.*, 18 Maryland, 26; *State v. Remyor*, 41 N. J., 96; *County of Santa Clara v. So. Pac. R. R.*, 18 Fed. Rep., 410.

In the note to *Read v. Dingess*, 8 C. C. A. Rep., 401, is found an excellent statement of law involved in these words: "It being conceded that notice of a meeting of the Board of Equalization is necessary in order to invest their proceedings with the character of due process of law, it is next to be seen whether this notice must be actual personal notice to each individual whose assessment is to be affected, or whether it may be public or general.

"In some of the States it is held that although the fixing by the statute of a time and place for the meeting of the Board of Equalization is intended to operate as general notice to any persons who may feel aggrieved; yet the Board cannot at any time increase and assess valuation without actual notice to the persons whose rights or interests are to be affected thereby. Citing *Sioux City & P. R. R. v. Washington Co.*, 3 Neb., 30; *South Platte Land Co. v. Buffalo Co.*, 7 Neb., 253; *McGee v.*

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The State, Neb., 49 N. W. Rep., 220; *Patten v. Green*, 13 Cal., 325.

“But the great preponderance of authority is to the effect that if a public statute, of which all persons are bound to take notice, specifies the day and place when the Board of Equalization shall meet, a person affected by its action cannot complain that such action was taken without notice to him. *Santa Clara Co. v. Sou. Pa. R. R. Co.*, 18 Fed. Rep., 385; *Methodist Church v. Mayor of Baltimore*, 6 Gill., 391; *O’Neil v. Bridge Co.*, 18 Maryland, 26; *State v. Runyon*, 41 N. J. Law, 98; *Nixon v. Ruple*, 30 N. J. Law, 58; *St. Louis & I. M. R. R. v. Worthin*, 52 Ark., 529; *Hambleton v. Dempsey*, 20 Ohio St., 168; *State v. New Lindel Hotel Co.*, 9 Mo. App., 450.

“And on the same principle a published general notice of the meeting of the Board of Equalization is sufficient to give authority to act upon individual assessments. *Lamb v. Connoly*, 25 N. E., 1042; *Terrel v. Wheeler*, 25 N. E., 329 (123 N. Y., 76); *Fithian v. Wheeler*, 26 N. E., 141 (125 N. Y., 696).”

In 1 Desty on Taxation, p. 601, it is said: “The proceedings being judicial, the law must provide some kind of notice and opportunity to be heard before the proceedings become final, or they want the essential ingredients of due process of law. It may be given by personal citation or by statute. It is usually given by statute prescribing a time and place when parties may be heard;” and again, p.

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602: "It is in the power of the Legislature to determine what shall be sufficient to bring the parties into Court in tax proceedings."

In the State Railroad Tax Cases, 92 U. S., 609, it is said: "The main function of the Board is to equalize assessments over the whole State. If they find that a county has had its property assessed too high in reference to the general standing, they may reduce the valuation; if it has been fixed too low, they may raise it to that standard. When they raise it in any county, they necessarily raise it on every individual who owns any property in that county. Must each one of these have notice and a separate hearing? If a railroad company is by law entitled to such notice, surely every individual is equally entitled to it. Yet, if this be so, the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of the Board impossible. The very moment you come to apply to the individual the right claimed in this case by the corporation, its absurdity is apparent. Nor is there any hardship in the matter. The Board has its time of sitting fixed by law. Its sessions are not secret. No obstructions exist to the appearance of any one before it to assert a right or redress a wrong, and in the business of assessing taxes, this is all that can be reasonably asked."

In the case of *Santa Clara Co. v. Sou. Pa. R. R.*, 18 Fed. Rep., 411, it is said: "The notice

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. . . need not be a personal citation. It is sufficient if it be given by law, designating the time and place where parties may contest the justice of the valuation. As a general rule, only a statutory notice is given. The State may designate the kind of notice and the manner in which it shall be given."

All that we assert or have asserted is that there must be a notice of some kind which will call the attention of the parties to the subject and inform them where and when they will be permitted to expose any alleged wrong in the valuation of which they may complain.

But the Court is forced to the same conclusion upon another point, and that is that complainant does not occupy such a status as that he is entitled to any relief or that his complaint can be heard. The provision of the Constitution in regard to taxation, necessary to be considered in this case, is: "All property shall be taxed according to its value, that value is to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State." Cons., Art. 2, Sec. 28.

Section 4 of the Act of 1899, under which this assessment is made, directs that all property shall be assessed at its *actual cash value*, and actual cash value is there defined as the amount of money the property would bring if sold at a fair voluntary sale.

We do not stop to inquire whether the Legislature might adopt a different basis for estimating

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value. It is sufficient to say that it has adopted this basis, and this is made prominent in every section of the Act that refers in any way to the valuation of property.

There are, then, two fundamental principles to be taken as guides in assessing property under our Constitution and laws: (1) That all property shall be assessed at its actual cash value; and (2) that taxes shall be equal and uniform. The latter proposition flows naturally and inevitably as a corrolary to the former, for, when all property is assessed at its actual cash value, then all taxes become equal and uniform. However difficult it may be to arrive at the first result, it is imperatively demanded by the Constitution and laws, and the second unavoidably and from necessity follows it, and to adopt a cash valuation is the only basis upon which it is practicable to make taxes equal and uniform.

It is said that Subsection 6 of Section 39 of the Act in controversy recognizes the doctrine of proportionate rating, and that a taxpayer is entitled to relief if his property is assessed at a higher percentage of value than other like property owned by other taxpayers, even though it is not assessed at its full cash value. That section provides that the State Board of Equalization may hear a complaint from any taxpayer, made on the ground that other property than his own has been assessed at less than its actual cash value, or at a less percentage of value than his own; but this appears to be made

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of equalizing the property of the complaining owner, not by the lowering his assessment, but by raising that of other persons who have not been adequately assessed.

It is the evident policy and object of the law, in cases of unequal assessments, not to reduce the assessments upon the property unless it has been assessed beyond its actual value, but, instead, to raise up to that valuation all property that has been inadequately assessed, and thus to equalize taxation on all property. The recourse offered to the taxpayer is not to reduce his own assessment, unless it is beyond its actual cash value, but to have that of his neighbor increased until both reach the point of actual cash value and thus become equal and uniform, as the law provides and the Constitution contemplates. This idea is manifested in many provisions of the statute not necessary to be specifically pointed out. It may be found in every section that refers to value. The question then recurs, Can a taxpayer, who confesses that his property has not been taxed at its actual cash value, complain of his own assessment because other property owners have been inadequately assessed? Upon this feature of the case, which is determinative of this case, there is a conflict of authority. Much of this conflict is more apparent than real, and arises out of the differences in statutory and constitutional provisions in regard to assessments and taxation of

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property in different States. Sec 25 Am. & Eng. Enc. Law, 225, note 4.

The case of *Wagoner v. Loomis*, 37 Ohio St., 571, is a well considered case and very much in point. It is said in that case: "That the statutes of Ohio require all property to be taxed at its true value in money, and the equality required by the Constitution has no other test." Again: "Where, then, lies the equity of this case? While it cannot be said that the plaintiffs below should be compelled to pay more taxes in proportion to the value of their property than is required of other taxpayers of the county, it must be affirmed that other taxpayers should pay as much as is required of the plaintiff in proportion to the value of their respective properties, and that is to say until all have paid the required rate upon the full and true value of their respective properties. And if for such reasons (disproportionate assessments at less than their value), relief can be given to plaintiff, we see no reason why the like relief may not be given every taxpayer in the State whose property has been assessed at more than forty per centum of its true value, even to the destruction of the revenues of the State."

This case distinguishes between instances where the overvaluation arises from a mere estimate or opinion and one where it is the result of fraud, conspiracy, or a combination or design to fix on one class of property heavier taxes than upon another,

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and the case is differentiated upon these features from the cases of *Pelton v. The Bank*, 101 U. S., 143; *Cummings v. The Bank*, 103 U. S., 153.

The Constitution of Ohio requires an assessment upon a basis of true value and equality at the same time, as does the Constitution of Tennessee. This case is referred to and commented on in *Bank v. Lucan County*, 25 Fed. Rep., 750, in this language: "I understand that the Supreme Court of Ohio decided that, inasmuch as the Constitution and laws of the State provide for equality of taxation, by requiring all property, whatever it be, assessed for taxation at its true value in money, any citizen whose property is assessed below that value has no just cause of complaint because the property of other citizens is assessed at less than his own, and his only remedy is to apply to the assessing officers to increase all assessments to their true value in money."

This is the Constitutional test of equality, and even where there is a fraudulent conspiracy to discriminate against a citizen, or a class of citizens, there is no relief unless it can be shown that the burden imposed is greater than it would have been if all assessments had been made at their true value in money. See, also, *Louisville R. R. Co. v. Commonwealth Ky.*, 49 S. W. Rep., 466.

We do not intend to be understood as going to the extent of holding an assessment conclusive in case of collusion and conspiracy to fix upon one

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species of property an over or under valuation, for such feature is not presented or charged in this case, but in such cases we prefer the rule announced by Chief Justice Waite in *Cummings v. Bank*, 103 U. S., 153, that fraud, conspiracy and collusion will open up the assessment to complaint. *Taylor v. L. & N. R. R. Co.*, 88 Fed. Rep., 350; *Walter v. Chamberline*, 60 Fed. Rep., 788; *Lowell v. Commissioners*, 152 Mass., 372.

In accord with our view are many cases and authorities. 25 Am. & Eng. Enc. Law, 65, and Note S.

In *Pacific Hotel Co. v. Lib.*, 83 Ill., 684, it is said in substance: "If it appears that an assessment is not greater than the taxpayer could be called on to pay, it is immaterial." In a similar case it was refused to set aside the assessment by *certiorari* or to restrain the collection by injunction. *State v. Morris*, 48 N. J. Law, 99; *Union Pac. R. R. v. Lincoln Co.*, 21 Dill., 279.

The remedy offered the taxpayer in such cases is to have his neighbor's assessment raised to its proper basis. 25 Am. & Eng. Enc. Law, 451. See, also, *Perry's Petition*, 16 N. H., 43; *Edes v. Boardman*, 58 N. H., 586.

We are not unmindful that there are some authorities holding a contrary doctrine, and we are referred especially to the Tennessee Railroad cases, 26 Fed. Rep., 168; and, *Taylor v. L. & N. R. R. Co.*, 88 Fed Rep., 350; *Merc. Nat. Bank v. Hub-*

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bard, 105 Fed. Rep., 509; as in conflict with our holding; but the cases referred to as arising under the statutes of Tennessee were cases construing a different act from the one now under consideration, and it is a part of our legislative and judicial history that the language of the Act of 1899 was designed to meet the holding of the Court in these cases.

In the case of *Taylor v. The Railroad*, 88 Fed. Rep., 350, the Circuit Judge of the United States recognized the doctrine of proportionate valuations. Whether this holding was correct or not, under the statute as it then stood, we do not stop to consider. It is apparent that the Act of 1899 intended to do away with this view by providing for a valuation upon a cash basis alone, and this is made so prominent in the various sections of the Act that no room is left for any question as to the legislative intent. In the *Taylor* case the Court found itself confronted, as it says, by a serious dilemma, to wit, that the Constitution required assessments to be made upon the true cash value, and, at the same time, to be equal and uniform. But the Court found that, while the State and County Assessors had systematically, and by what amounted to a preconcert of action, disregarded the law and assessed property upon a percentage of value, the Railroad Assessors had attempted to comply with the law by assessing at actual value. The result was that railroad property was assessed upon a higher basis than other property, and taxes were not made equal and

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uniform. In this dilemma the Court confessedly departed from the law in order to secure uniformity between the different classes of property, basing its decision partly upon the case of *Cummings v. The Bank*, 111 U. S., 153, decided by the Supreme Court of the United States, and *Reelfoot Lake v. Dawson*, 97 Tenn., 160. We will not stop to comment on these cases further than to say that the doctrine of assessment and taxation upon a percentage of value instead of true value or actual cash value finds no warrant in the language used in the *Reelfoot Lake* case. The only expression used in that case that can be considered to hold such a doctrine is the following: "*This means that every property tax shall be graduated by the value of the property on which it is laid.*"

This expression is used in pointing out the difference in the mode of assessing real estate under the Constitution of 1796, and the subsequent constitutions of 1834 and 1870, the former assessing taxes by the lot or tract, and the latter by value, and not by the tract, and the clear meaning of the expression used is that every property tax shall be determined by the value of the property and not by the tract. But it by no means warrants the idea that a percentage of value may be made the basis of assessment, but, on the contrary, the "*actual value*," or "*true value*," or "*cash value*," the expressions being synonymous, are made the basis by which the tax or value must be graduated or

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determined. The entire paragraph from which the expression is taken is this: "Under the Constitution of 1796, lands were taxed by the hundred acres, but the Constitution of 1834, like that of 1870, contained a provision that all property shall be taxed according to its value. This means that every property tax should be graduated by the value of the property on which it is laid," citing cases.

It was evidently the purpose of the General Assembly, in the Act of 1899, to escape the percentage valuation idea as to any and every kind of taxable property, and fix upon the actual cash value as the basis upon which all assessments should be made so as to meet both requirements of the Constitution, the assessment of property at its value, and at the same time taxation should be equal and uniform. The Constitution of 1870, Art. 2, Sec. 28, directs that all property shall be taxed according to value, that value to be ascertained in such manner as the Legislature may direct, so that taxes shall be equal and uniform throughout the State, and so that no species of property from which a tax may be collected shall be taxed heavier than any other species of property of the same value. The Legislature of 1899, by the Act under which this assessment was made, directed the manner in which the actual cash value should be ascertained, and this, under the Constitution, it had the power to do, and did do, and its action and mode is final and conclusive. The impracticability of adopting any other than the actual cash value as

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the basis of equalization forcibly appears in the present case. Complainant's property, according to his bill, is assessed at ninety *per centum* of its actual value, and another class of property is assessed at seventy-five; another at sixty, another at forty. The average is said to be sixty. Now, to what percentage shall complainant be reduced? He has as much right to a forty *per centum* valuation as to one at sixty and seventy-five *per centum* and so has every other property owner in Shelby County. Again, it is evident that, if complainant could obtain relief under his present bill, it would still leave his property liable to be back-assessed, under our statute, for three years. Indeed, upon the concession made in this bill, if complainant's property is not assessed at its actual cash value, it would become at once the duty of the Comptroller to cause it to be back-assessed at its actual value, so that under our system there is but one basis upon which values can be made finally to rest, and that is the actual cash value, and until that is reached no property is free from the machinery of the law designed to place it on that basis. It is well to note, also, that complainant in this case only compares his property with other property around him, and not with other property in other localities of the State. We have, therefore, in the present case a property owner who confesses that his property is assessed at less than its actual value, complaining because, in his opinion, his neighbor's property is assessed at a still

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lower valuation. It is no ground for relief to him, nor can any taxpayer be heard to complain of his assessment when it is below the actual cash valuation of the property, on the grounds that his neighbor's property is assessed at a less percentage of its true or actual value than his own. When he comes into Court asking relief of his own assessment he must be able to allege and show that his property is assessed at more than its actual cash value. He may come before an Equalizing Board, or, perhaps, before the Courts, and show that his neighbor's property is assessed at less than its actual cash value and ask to have it raised to his own, if his is at the cash value, and in this way the Courts, Legislatures and taxpayers will co-operate to tax all property at its actual cash value and to make all taxes equal and uniform, as the Constitution contemplates. *The actual cash value is the only practicable basis upon which taxes can be made equal and uniform, and this is clearly the constitutional requirement, the legislative intent, and should be the effort of the Court as well as taxpayers.* While valuations may in this way be increased, it will result in no hardship, as the rate of taxation will be proportionately lowered and yet produce the same revenue; and when this rule is applied to all property of every class and character, whether corporate or individual, there will be no hardship, and the soundest public policy will be subserved and the only rational and feasible basis for assessment will be reached.

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This, we understand, has been the uniform ruling of this Court. *Brown v. Greer*, 3 Head, 696; *Chattanooga v. Railroad*, 7 Lea, 569; *State v. Butler*, 11 Lea, 410; *Street Railway v. Morrow*, 87 Tenn., 415; *Ellis v. R. R. Co.*, 8 Bax., 531; *Jenkins v. Ewin*, 8 Heis., 458.

We are of opinion, for the reasons stated, that complainant is entitled to no relief, and the decree of the Court below dismissing his bill is affirmed with costs.

Chief Justice Snodgrass does not concur in this opinion and holding.

Hart v. Union City.

HART v. UNION CITY.

(*Jackson.* June 15, 1901.)

VERDICT. *Not set aside, when.*

This Court will not set aside a verdict in favor of the defendant for want of evidence to support it, in an action by a widow to recover damages for the negligent killing of her husband, when there is no direct evidence of the manner of his death and the circumstances make it as probable, to say the least of it, that he died from natural causes—heart disease—as from defendant's negligent act.

FROM OBION.

Appeal in error from Circuit Court of Obion County.

YANDALL HAUN and WADDELL & WADDELL for Hart.

MOORE & WELLS for Union City.

WILKES, J. This is an action of damages for the negligent killing of the plaintiff's husband and intestate. There was a trial before the Judge, in the Court below, without the intervention of a jury. Upon request, properly made, the trial Judge made a written statement of his findings of law and fact. He held the city not liable under the record, and dismissed plaintiff's suit, and she has appealed and

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assigned errors. The finding of facts by the trial Judge is very full and elaborate, and we will only mention a few features of importance. The real defense on the merits is that there is no evidence to support the finding and judgment of the trial Judge.

The intestate was a night policeman of Union City, and had been for three or four years. On the morning of January 15, 1899, he was found dead on the floor of the city calaboose. There was nothing to positively indicate how he came by his death. There were two small burns upon one of his hands, but which does not definitely appear, but they were so small as not to be at first noticeable. The deceased was a large man, weighing some 220 to 225 pounds, a habitual smoker, but only an occasional user of beer and liquors. He had been heard to complain on several occasions of a trouble with his heart. It appears that, on the evening before the death, he went to the superintendent of the city light plant and obtained a new globe, to be placed on the drop cord in the station house. This was found in his pocket after his death.

The theory of the plaintiff is that, in attempting to put this globe on and screw it into its socket, he received an electric shock which caused his immediate death. It appears that the drop-cord upon which this globe was to be fastened was only designed for the carriage of 104 volts of electricity; and that it would not be dangerous for a well man to receive this amount into his system, so that put

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ting the globe on was not dangerous, nor could death have been caused if the other apparatus of the light plant was in good and perfect condition.

It is shown, however, that there were two lines of wire—one called the primary line, and the other the secondary circuit; the former charged with 1,040 volts, and very dangerous, and the other with only 104 volts, and, as stated, not dangerous.

The insistence is that the wires of the two circuits had, at some place and in some way, become crossed, and the primary wire, at the same time, grounded, so that, when the deceased touched the drop-cord, he received the whole discharge of the primary current and was instantly killed.

No definite, positive proof of such a condition of things is made, but there is some evidence that, on the day prior to this, there had been some crossing or sagging of wires in the city, which caused disturbances along the lines; but the evidence very clearly shows that all of these troubles had been remedied and repaired and none of them existed when the accident took place. There is, also, evidence tending to show that there was some disturbance during the day at Crossners fruit stand, which was on the same short line with the calaboose, but these do not appear to have been of a serious character, and certainly were not dangerous.

The argument, which is very ably pressed, is that there must have been some defect or disturbance of this kind, because the death could not be accounted

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for in any other way. The trial Judge was of opinion that, from the position in which the body was found, it might be reasonably inferred that the death was so caused, but that it could not have been caused by the secondary current alone, unless the heart of the deceased was affected; nor was there any proof to show the crossing of the currents and the passage of the primary current into the deceased's body; in other words, that the plaintiff had not been able to show such a state of things as would justify a finding that deceased was killed by electricity, and that it was equally as reasonable to conclude that it was the result of heart failure.

Without going at length into the evidential facts in the case, we are satisfied plaintiff has not been able to make out her case. Indeed, we are not able to see that she has even established a *prima facie* case. On the other hand, the city has shown that, at the time of the death, there was nothing the matter with the electric light lines that would make them dangerous. This is shown by the testimony of the Superintendent and Engineer, by their experiments made immediately after the deceased was found, and by the physical facts which they recite, and numerous details which are given, and which, we think, show affirmatively that the plant was in safe working order, and the death was not shown to have been the result of defects in the construction or operation of the plant.

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It may be that the death was caused by such a condition of affairs, but we think the plaintiff has not been able to show it, and the Court cannot presume it, because that would be a reasonable explanation of the death, especially when there is another equally as reasonable and plausible—that is, death from heart failure. We think that the examinations made of the plant and wires and circuits immediately after the death, were sufficient to overturn any *prima facie* case, if one had been made out, which we do not think was done. The nearest approach plaintiff is able to make towards showing defects in the line, is the fact that there was a disturbance at Crossner's fruit stand, which was on a short circuit between the transformer and the station house. But several persons received shocks from the wire at Crossner's and were not injured, and the conditions at that place, the light being out of doors and persons touching it being on the ground, made that more dangerous than the light in the station house. In addition, it is shown that the transformer was in good condition, and there is not only no proof to show how the primary current could get on the secondary circuit, but the evidence clearly demonstrates that, as a fact, it did not, and could not do so. If, therefore, a presumption could arise, from the position in which the body was found, that death was caused by the electric wire, that presumption is overthrown by proof that the wires were in good condition and that no defect existed.

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Plaintiff's counsel has made a very able and ingenious argument to sustain his theory and has shown a thorough knowledge of electrical conditions and phenomena, but he fails at the threshold to show any contact with the wire, or any disturbed or improper condition of the wires, and is met by the positive proof of the city showing the perfect condition of the plant, and the improbability, if not impossibility, of the death being caused by an electric discharge.

The judgment of the Court below is affirmed with costs.

Wilson v. Schaefer.

WILSON v. SCHAEFER.

*(Jackson. June 15, 1901.)*1. BILL OF REVIEW. *Remainderman barred, when.*

A remainderman's right to prosecute bill of review to reverse a decree affecting his interest in realty is barred unless he proceeds within three years after date of decree, or, in case of his disability, within three years after its removal, notwithstanding the existence and continuance of the life estate. (*Post*, pp. 319-321.)

Code construed: §§ 4477, 4848 (S.); §§ 3477, 3478 (M. & V.); §§ 2780, 2781 (T. & S.).

Cases cited: *Aiken v. Suttle*, 4 Lea, 103; *Winchester v. Winchester*, 1 Head, 460.

2. SAME. *Maintainable by persons not in esse at date of decree.*

Persons not *in esse* at date of decree, but whose interests were before the Court by virtual representation, and are precluded by the decree, are not debarred a bill of review to reverse the decree by reason of not having been parties to the original cause. (*Post*, pp. 321, 322.)

3. SAME. *For error apparent, maintainable when.*

A bill of review for error apparent cannot be maintained unless the decree complained of is contrary to some statutory enactment, or in violation of some settled and recognized principle or rule of equity, or at variance with the forms or practice of the Court. It cannot be maintained for merely formal irregularities, or by a party who is not prejudiced by the decree. (*Post*, p. 322.)

Cases cited: *Railroad v. Rainey*, 7 Cold., 420; *Livingston v. Noe*, 1 Lea, 55; *Montgomery v. Olwell*, 1 Tenn. Ch., 169.

4. SAME. *Same.*

To ascertain the existence of error apparent, it is competent to look back of the decree to the pleadings, orders, and reports of Master, but not to the evidence. The propriety of the

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decree upon the evidence cannot be inquired into. (*Post*, pp. 322, 323.)

Cases cited: *Winchester v. Winchester*, 1 Head, 460; *Fuller v. McFarland*, 6 Heis., 79; *Livingston v. Noe*, 1 Lea, 55; *Ward v. Kent*, 6 Lea, 128; *Rodgers v. Dibrell*, 6 Lea, 69; *Drake v. Drake*, 12 Heis., 704; *Anderson v. Bank*, 5 Sneed, 661; *Berdanatti v. Sexton*, 3 Tenn. Ch., 699.

5. SAME. *For new matter, essentials of.*

New matter for which a bill of review is maintainable, must be relevant and material, bearing directly on the merits of the case and affecting the very foundation of the decree, and must be such as would probably have changed the result had it been brought forward, and must have been unknown to the complainant or his attorney, and not discoverable by them by the exercise of due diligence, until it was too late to use it in the suit. (*Post*, pp. 323, 324.)

Cases cited: *Puryear v. Puryear*, 5 Bax., 640; *Cleveland v. Martin*, 2 Head, 128; *Winchester v. Winchester*, 1 Head, 460; *Long v. Granberry*, 2 Tenn. Ch., 85.

6. SAME. *Same.*

And the new matter must be so stated in the bill of review, that the Court may, upon demurrer, determine its character, and not be left to judge of its sufficiency upon consideration of the additional testimony in connection with the evidence in the original cause. (*Post*, pp. 323, 324.)

Cases cited: *Clark v. Garrett*, 6 Lea, 262; *Livingston v. Noe*, 1 Lea, 55; *Burson v. Dosser*, 1 Heis., 761.

7. SAME. *Joinder of, with bill to impeach decree for fraud.*

The joinder of a bill of review with an original bill impeaching a decree for fraud is not in consonance with the practice in courts of equity, and leads to great confusion. The two classes of bills are radically different in their objects and effects. (*Post*, pp. 324, 325.)

8. DECREE. *Coram non judice.*

A decree, outside the scope of the pleadings, is *coram non judice*, are void; but this rule does not extend to consent decrees rendered in causes where the Court had jurisdiction of the parties and of the subject-matter. (*Post*, pp. 327, 328.)

Cases cited: *Bank v. Carpenter*, 97 Tenn., 437; *Randolph v. Bank*, 9 Lea, 63; *Rogers v. Breen*, 9 Heis., 679; *Easley v. Tarkington*,

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5 Bax., 592; Bigley v. Watson, 98 Tenn., 353; Boyce v. Stanton, 15 Lea., 347.

9. SAME. *Same.*

A decree is not void, even if it is erroneous, and reversible on appeal or writ of error, where the Court has jurisdiction of the subject-matter and of the parties, whether the jurisdiction is inherent or statutory. (*Post pp. 331, 332.*)

Cases cited: Hurt v. Long, 90 Tenn., 445; Kelley v. Kelley, 15 Lea, 198; Livingston v. Noe, 1 Lea, 55; Fulton v. Davidson, 3 Heis., 614; McGavock v. Bell, 3 Cold., 512; Hopper v. Fisher, 2 Head, 252; Winchester v. Winchester, 1 Head, 500.

10. SAME. *Conclusive upon infants.*

Infants are concluded to the same extent as adult parties by decree of the Chancery Court, and are entitled to the same proceedings for correction of errors therein, and to none other. (*Post, pp. 330, 331.*)

Case cited: Hurt v. Long, 90 Tenn., 445.

11. SAME. *By consent binds infant, when.*

A consent decree binds an infant, which is made by compromise with his next friend, under the approval and ratification of the Court, in a cause to which he is a party, and of the subject-matter and parties to which the Court has jurisdiction, although his guardian and counsel may not have assented to same. (*Post, pp. 332-336.*)

12. SAME. *For exchange of infant's lands not void.*

A decree for the exchange of infant's lands in this State for lands situated in another State, rendered in a proper proceeding for the conversion of the infant's lands situated in this State, is not void, though it might be deemed erroneous on appeal or writ of error. (*Post, p. 336.*)

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, J.

Wilson v. Schaefer.

P. W. McBETH and GILLHAM & GILLHAM for Wilson.

McFARLAND & NEBLETT, THOMAS M. SCRUGGS, and METCALF & METCALF for Schafer.

McALISTER, J. This bill was filed on June 28, 1900, as a bill of review to set aside a decree pronounced by the Chancery Court of Shelby County on March 11, 1874, for error apparent on the face of the decree and for newly discovered evidence. It is also filed as a bill in the nature of a bill of review and as an original bill seeking to impeach said decree for fraud. The bill was filed by remaindermen under the will of W. C. Bradford, deceased, who claim that the life estate in certain valuable realty in the city of Memphis terminated in 1891, when they became entitled to possession, but that they are wrongfully kept out of possession by the defendants, who claim title by virtue of a compromise decree rendered in 1874. It is charged that complainants were under disability when their rights accrued, and that this disability still exists. It is alleged that said compromise decree is void, for the reason that the Court had no jurisdiction of the parties; that said decree was not warranted by the pleadings; that the Court had no jurisdiction to exchange real estate of minors situated in Tennessee for real estate located in Illinois, and, finally, it is charged that said decree was fraudulently obtained.

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Demurrers were interposed to this bill by the several defendants. The Chancellor, while adjudging several of the demurrers good, sustained the bill on the ground that the compromise decree of 1874 was not within the scope of the pleadings, *coram non judice*, and void. The Chancellor, in the exercise of the discretion given him by the statute, permitted each party to appeal. Defendants perfected their appeals, and complainants have brought the case to this Court by writ of error.

It is necessary, in order to present the issues in controversy, that a more specific statement of the case, as made in the bill and exhibits, be outlined. The several pieces of property in controversy are now owned by the Livermore Foundry Company, Mary E. Coover, Lawrence B. Coover, and B. G. Henning, who are the real defendants to the bill. It is charged in the bill that one Wat C. Bradford, a citizen of Memphis, Tennessee, died in Tennessee in 1864, owning the real estate involved in this litigation, situated in Memphis, Tennessee. He left a will, which was probated in Shelby County, Tennessee, in 1864, by which he devised all his property to his widow, Catherine A. Bradford, "in trust, that she may enjoy and hold the same, with its emoluments and profits, for and during the term of her natural life, for the support and maintenance of herself and family, and the remainder and reversion thereof to my daughter, Mary Knapp, wife of — Knapp, and her children, then living or thereafter

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to be born, free from the debts, contracts, or engagements of her present or any future husband. My wife, if she desires, may, at any time, set apart and deliver to my said daughter, Mary Knapp, any portion of said property, real or personal, to be held by her," etc. The will also directs the executors to pay debts "out of any moneys now on hand, or to be realized hereafter from collections or from the sale of real or personal property, which they are hereby authorized to make for that purpose."

William Chase and J. M. Provine were named as executors of the will. Provine declined to qualify, and Chase, with the widow, Catherine A., qualified as executors, and acted as such until March, 1867, at which time Chase settled his accounts in the probate Court and resigned. The widow had married Dr. H. Schaefer shortly before Chase's resignation, and thereafter continued as administratrix with the will annexed.

It is alleged that on August 10, 1867, Catherine A. Schaefer, administratrix of the estate of Wat C. Bradford, and H. Schaefer, and Mary C. Knapp executed to Reuben Jones, of Baltimore, Md., a deed for the recited consideration of \$5,000, purporting to convey to Jones a certain lot in the city of Memphis, fronting on the east side of Town Reserve street, or Brinkley avenue, 230 feet, and running back between parallel lines 218 feet and 9 inches, it being the homestead lot on which Brad-

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ford lived at the time of his death, and now owned by the defendant, Henning.

It is further alleged that on August 15, 1867, the same parties conveyed to the said Reuben Jones, for the expressed consideration of \$25,000, another lot in the city of Memphis, situated on Adams and Washington streets. The part of said lot fronting on Washington street is claimed by the Coover estate, while that part fronting on Adams street is now owned by the Livermore Foundry. It should be remarked in this connection that in the settlement filed by the executrix, Catherine A. Schaefer, she accounted for the sum of \$30,000, purchase money for the lots aforesaid, as having been collected on August 15, 1867, from one Jones.

It is charged in the bill that these conveyances were fraudulent, and were made to Reuben Jones, who was a brother to Mrs. Schaefer, without his knowledge or consent; that he never heard of the conveyances until a year or two after their execution; that he never saw the property, and paid no part of the purported consideration. It is then charged that said conveyances were the result of a fraudulent scheme on the part of Dr. Schaefer to defeat the remainder estate of the children of Mrs. Knapp in said property, and to realize for himself the proceeds of the sales.

It is conceded in the bill that both Mrs. Schaefer and her daughter were innocent in the matter, and were induced to join in the conveyances through the

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fraud, misrepresentations, and undue influence of Dr. Schaefer. It is further alleged that the property in question remained in this state of title until the year 1870, when Dr. Schaefer negotiated an exchange of it with Adam Smith, of the State of Illinois, for property situated in that State; and thereupon Schaefer and wife applied to Jones to convey the Memphis property to Smith. It is claimed that this is the first knowledge Jones received that the Memphis property had been conveyed to him. Jones objected to the transaction, and refused, upon the advice of his counsel, to execute a warranty deed. Afterwards he reluctantly executed quitclaim deeds to the property to Smith, on the 26th October, 1871.

It was further shown that shortly after the execution of the deeds from Schaefer and wife and Mrs. Knapp to Reuben Jones, Schaefer moved the family, including Mrs. Knapp and children, from Memphis to Illinois, where they have since resided.

Mrs. Knapp, about April, 1871, intermarried with David Burnham. Mrs. Knapp had four children by her first husband, three of whom are now living, and are parties to the present suit—namely, Catherine B. Wilson, Elizabeth G. Dunham, and Mamie F. Hungerford. Wat C. Knapp, son of Mary Knapp, died intestate, and his son and sole heir, Dillis C. Knapp, a minor, is also complainant. Mrs. Burnham (Mary C. Knapp) has one child, John D. Burnham, by her second marriage.

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It is further alleged that on September 11, 1871, a bill was filed in the Chancery Court of Shelby County styled Reuben Jones v. H. Schaefer, Catherine A. Schaefer, Mary C. Burnham, David Burnham (her husband), Mary Knapp, Kate Knapp, Lizzie Knapp, and Will C. Knapp, alleging the execution of the deeds from Schaefer to Jones; that said deeds were intended as an execution of the power of sale given by the will of Wat. C. Bradford, deceased, to pay the debts of the estate, but that they failed to make proper recital in the first deeds; that they subsequently executed another deed to him, reciting the facts above stated, and quoting from the will the powers given to such executors, which they sought to have approved and confirmed by the Court as a valid execution of the power. It is stated that this deed was filed with the bill, but never recorded. It appears that publication was made for all the defendants to this bill, including the minors, and on November 1, 1871, T. B. Turley was appointed by the Court *guardian ad litem* for the minor defendants, Mary, Kate, Lizzie and Wat. C. Knapp. On May 4, 1872, these minors, by their said guardian *ad litem*, filed an answer to this bill. On April 15, 1873, David Burnham and wife, Mary C. Burnham, filed an answer for themselves, and a cross-bill for themselves and as next friend of Mary, Kate, Lizzie and Wat. C. Knapp, against Reuben Jones, H. and Catherine Schaefer and Adam Smith. They set up in this cross-bill

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that Mary C. Knapp, now Burnham, was persuaded to join in the deeds executed to Jones, and previously set out herein, by the fraudulent representations of Jones and H. Schaefer, and that Jones had conveyed to Adam Smith by the false representations to Jones, and asked in the cross-bill that the Court construe the will of Wat. C. Bradford, and set aside all the deeds made to Jones and by Jones to Smith, and for the recovery of the real estate so conveyed.

Afterwards, on May 21, 1873, David Burnham and his wife, Mary, in their own behalf and as next friend to Mary, Kate, Lizzie, and Wat. C. Knapp, the minor children of Mary C., filed their original bill against Adam Smith, attacking the conveyances made to him, as the product of fraud and collusion between him and Schaefer, and seeking to have them all set aside and canceled. The bill charges that Smith had notice of all the circumstances under which Jones held the property. It is charged that no process was issued under the answer and cross-bill of Burnham and wife, filed in *Jones v. Schaefer*, nor did any process issue in Burnham and wife against Smith. It is further charged that no appearance was made nor answer filed by any one, either in the cross-bill or original bill filed by Burnham and wife. It appears that on October 4, 1873, the deposition of Reuben Jones, taken in the case of *Elliott v. Hanson*, then pending in the Chancery Court of Shelby County, was filed in *Jones v. Schaefer*, under an agreement that it might be used as evi-

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dence, wherein it was disclosed that Jones had never purchased the property or paid anything for it, and that he had conveyed it by quit-claim deeds, in 1870, to Smith, and that the bill of *Smith v. Jones* was filed without his knowledge or consent; that it was a fraud on him and a fraud on the Court.

It further appears that on November 19, 1873, Reuben Jones filed his answer to the cross-bill of Mary C. Burnham in the first cause of *Jones v. Schaefer*, in which he entered a disclaimer of the original bill, and asked that he be dismissed from that proceeding.

On February 20, 1874, an order was entered in the two causes of *Jones v. Schaefer* and *Burnham v. Smith*, substituting Adam Smith as the complainant in the first cause in the place of Reuben Jones, reciting in said decree that Smith had purchased the legal title to the property mentioned in the bill, and is now claiming title thereunder, and upon his prayer to be allowed to become complainant in the name and stead of Reuben Jones, so as to have the questions in the said suit determined without the delay and expense of a new suit, it was decreed, viz.: "And it appearing to the Court, from the pleadings and proof, that it is to the interest of the minors to have the matters now presented in said record finally and promptly disposed of, and the adult parties consenting thereto, upon the application of Adam Smith, the Court doth order that

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the cause stand in the name of Adam Smith, and that the same be dismissed so far as Reuben Jones is concerned, but that the cause be retained in this Court, with all the pleadings, and proofs, and orders, as though Adam Smith were complainant, and that the petition heretofore filed in this cause stand as though filed in the case of *David Burnham et al. v. Adam Smith*, and that all matters involved in said petition and in said two causes be consolidated and heard with the case of *David Burnham*, and that Mr. T. B. Turley, guardian ad litem, appointed in the case of Reuben Jones, continue to represent and defend the interests of said minors in all matters involved in the two causes and in the petition referred to."

The petition referred to in the foregoing decree was filed in the Jones case on February 9, 1874, in the name of David Burnham and Mary C. Burnham, his wife, and Kate, Lizzie, Mary, and Wat. C. Knapp, minors, suing by David and Mary Burnham as their next friends, in which it is recited that petitioners and Adam Smith had been trying to settle and compromise this litigation and they had finally agreed to a settlement, which they asked the Court to confirm.

The petition set forth the following, among other reasons, to show that said settlement should be ratified: It was stated that one W. Y. Elliott had filed his bill to sell the property of Wat. C. Bradford to satisfy a judgment against his estate for

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\$5,000, and that it would be necessary to sell land to pay that debt; that Adam Smith claimed he was an innocent purchaser of the property for a valuable consideration, notwithstanding Jones had paid nothing for the property. It was further stated that the legal rights of the parties are doubtful, and that it may be that Adam Smith has acquired a good and legal title to said property. The petition further stated that it is manifestly to the interest of the minor heirs to make such settlement, even if Adam Smith's title be ultimately held void; that the minors are without means to keep said property in repair and pay the taxes; that petitioners cannot get possession of their remainder interest in said realty until the death of Mrs. Schaefer, who is now about fifty years of age and very healthy, with a life expectancy of twenty-one years; that Smith certainly acquired, under her deed, the life estate of Mrs. Schaefer, and petitioners will get nothing from said estate until the death of Mrs. Schaefer, and they would then be left to grow up without the support, maintenance, and education which, at their tender ages, they so much need. It was further stated that the property in Illinois for which the Memphis property is to be exchanged under said compromise and settlement is of greater value than the Memphis property, and they will come at once into its possession. Many other reasons are stated in the petition to show that this compro-

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mise settlement is manifestly to the interest of the minor heirs.

On February 19, 1874, a reference was made to the Clerk to report the value of the Memphis property, and to show the value of the interest of the minor children of Mary Knapp in the same after the life estate of Mrs. Schaefer, and to report whether it would be to the interest of the minors to make the compromise stipulated in the agreement. Said report to be made within ten days, unless otherwise ordered by the Court.

On February 20, 1874, in *Jones v. Schaefer*, the following order was entered: "In this cause T. B. Turley, the guardian *ad litem*, having this day come into Court and objected to the petition asking for a compromise, filed herein February 19, 1874, standing or being made in the names of the minor defendants, Mary Knapp, Kate Knapp, Lizzie Knapp, and Wat. C. Knapp, it is ordered by the Court that their names be stricken out, and the petition stand as the petition of David and Mary Burnham, and the order of reference made herein, on February 19, 1874, be corrected so as to show that the reference is made on the petition of David and Mary Burnham."

Proof was taken on the order of reference touching the title and value of the property, both in Tennessee and Illinois, which was proposed to be exchanged, and the advisability of carrying out the compromise agreement.

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On March 2, 1874, the Clerk and Master filed his report, in which he stated that Adam Smith had acquired the life estate of Mrs. Schaefer in the Memphis property, and likewise the interest of Mary C. Burnham, who was one of the remaindermen, leaving only outstanding the remainder interest of the Burnham children; that the value of the Memphis property was \$31,700; that the property is encumbered by a judgment in favor of W. Y. Elliott for about \$5,000, and also a considerable amount of delinquent taxes; that Adam Smith proposes to pay in cash \$1,500 and \$1,468 back taxes; to pay the judgment of Elliott for \$5,000, to surrender to Mrs. Burnham a rent note of Cubbins & Gunn for \$1,000, and to vest in the minors a present fee simple title to valuable lands in Illinois, having an actual income of \$2,000 per annum, free from incumbrance, for the support and education of the children, and also a lot in Memphis worth \$2,500. The Master unhesitatingly reports that it would be to the interest of the minors that the exchange proposed be confirmed by the Court. The Clerk further reports that all of the Memphis property was subject to the life estate of Mrs. Schaefer, and that the life expectancy of Mrs. Schaefer was twenty-one years.

On March 11, 1874, there was a decree in the consolidated causes confirming the report of the Master, viz.: "Be it remembered that these consolidated causes came on to be heard before the Hon. S. P.

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Walker, Chancellor, etc., on March 11, 1874, upon the petition of David Burnham and wife, filed herein on February 19, 1874, and the exhibits thereto and the proof taken thereon, for the purpose of the reference to the Clerk and Master and for the use of the Court, and upon the report of the Clerk and Master, filed herein on March 2, 1874, which is in the words and figures following: (here insert report). And upon all the pleadings and upon all the proof already in said causes, including Wat. Bradford's will, and upon the record in the case of *Elliott v. Hanson et al.*, No. —, R. D., First Chancery Court, and upon the argument of counsel for the adult parties, and of guardian *ad litem* for the minor defendants and complainants herein, in which argument, among other things, the guardian *ad litem*, T. B. Turley, called the special attention of the Court to the fact that, upon the proof elicited, he claimed for minor defendants an immediate interest in the Memphis real estate under the third item of Wat. Bradford's will, and also called the Court's attention to the various reasons and facts in the proof, which he considered as repudiating the idea that Adam Smith was an innocent purchaser of the Memphis property, and all the exhibits having been properly proved as required by law, and the Court having made itself personally familiar with all the pleadings, exhibits, and proof and records above mentioned, and having carefully and deliberately weighed and considered them, and

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from all of which it appears to the satisfaction of the Court that the agreement or compromise made and entered into on February 11, 1874, by and between the adult parties to the suit of David Burnham v. Adam Smith, and H. Schaefer and wife, which, in the words and figures following (here insert agreement marked Exhibit C.g.), is manifestly to the interest and advantage of the minor parties hereto, for the reasons set forth in the petition and sustained by proof, and referred to in report of the Clerk and Master, wherefore the Court doth order and decree that said agreement or compromise be and the same are hereby in all things confirmed, so far as the same is necessary to bind the interests of said minors.

“And the Court doth further order, adjudge, and decree that, upon the execution by the said Smith of the necessary deeds to said Mary C. Burnham and her children, as tenants in common, as provided for in said agreement, and upon his satisfying the Court as to the title to the Illinois property, and upon his complying with the other requirements of said agreement on his part to be done and performed, that a decree be had and entered in these consolidated causes divesting all the right, title, and interest of all the parties herein in and to the property embraced in the deeds from Reuben Jones to Adam Smith, except the south forty-five feet of the Manassas street property; out of them, and vesting the same in Adam Smith, his heirs and assigns,

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forever. The Court doth further order that the cash to be paid by said Smith be paid into Court, to be drawn out by the regular guardian of said minors, upon his giving bond as required by law, after paying the cost of the guardian *ad litem* herein and such of the Court costs as are found to be due by them, the Court costs in both causes being hereby ordered to be equally divided between the complainants and defendant in said cause of David Burnham *et al* v. Adam Smith.

“It is ordered, further, that these causes, including the pleadings, decrees, orders, petitions, and exhibits, and all the proof taken in these causes, be enrolled. The cause is retained for such further orders as may be deemed necessary, and the Court reserves the right to rescind this compromise should said Smith fail to comply within a reasonable time.”

On April 6, 1874, the Court ordered a reference for further proof touching the title to one of the pieces of property, and, further proof being taken on that point and the defect having been remedied, there was a final decree on April 17, 1874, in the consolidated causes, divesting title out of the minors therein being, and also of any children thereafter to be born, in and to the Memphis property, and vesting the same in Adam Smith.

Since this decree was made four other children have been born to Mrs. Burnham by her second marriage. The complainants are the children of Mary C. Knapp, by her two marriages, together

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with^o the husbands of such as are married, and the representatives of such as have died. Catherine A. Schaefer died intestate February 12, 1891, and Mary C. Burnham died testate August 29, 1894, devising her property to her husband for life, with the remainder to her children. Complainant Catherine B. Knapp was □ born May 3, 1858, married Robert Wilson March 27, 1879. Elizabeth G. Knapp, born December 27, 1860, married John C. Burnham June 25, 1879. Mamie F. Knapp, born September 6, 1862, married Everett M. Hungerford November 10, 1879. Wat. C. Knapp, born September 16, 1864, died intestate February 18, 1891, at which time he was insane, and had been in that condition since prior to February 1, 1891. He left one child surviving him, Dillis C. Knapp, who is a minor, and sues by his next friend; also a widow, Kate W. Knapp, who is now the wife of James S. Bushnell. John C. Burnham, born December 21, 1872. Edward L. Burnham, born May 6, 1875, died intestate and without issue October 26, 1898. Ruth May Burnham, born May 31, 1877, married Everett D. Cone, August 16, 1899. Roy Burnham, born June 27, 1879. Ivy Burnham, born June 27, 1881, died July 9, 1893, intestate and without issue.

Complainants Catherine B. Wilson, Elizabeth G. Dunham, Mamie M. Hungerford and Ruth M. Cone have been all the time married women, living with their husbands from the dates respectively of their marriages. The bill charges that none of the com-

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plainants are barred by reason of disabilities from prosecuting this action.

Complainant assigns as error:

1. The action of the Chancellor in sustaining defendant's first demurrer, and decreeing that complainants, excepting Ruth M. Cone and Roy Burnham, could not maintain this bill as a bill of review for errors apparent, upon the ground that their action was not instituted within three years from the time they attained their majority.

It is insisted that none of the complainants are barred from maintaining this suit as a bill of review. In this connection may be considered defendant's assignment of errors on this subject, which is that the Chancellor erred in not holding that Ruth M. Cone and her husband, Everett D. Cone, and Roy Burnham were likewise barred with the other complainants.

Our statute (Shannon's Code, Sec. 4848; Acts of 1801, Ch. 6, Sec. 53) provides that: "No bill of review shall be brought, or a motion made therefor, except within three years from the time of the pronouncing of the decree, saving to infants, married women, persons of unsound mind, imprisoned, or beyond the limits of the United States a right to a bill of review within three years after such disability has been removed."

It is insisted by complainants' counsel that, under Section 4477, Shannon's Code, one of the general provisions as to limitations, that the limitation begins

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to run from the accrual of the right, and not from the date of the decree. The argument is then made that complainants had no right of action until February 12, 1891, when the life tenant, Mrs. Schaefer, died, but that, at that date, Mrs. Wilson, Mrs. Durham, and Mrs. Hungerford were married, and have continued under said disability of coverture until the present time.

If this were a possessory action for the recovery of the property, the argument might be sound, for, of course, remaindermen have no right to possession until the falling in of the life estate. But this is a bill of review to set aside the compromise decree of 1874, and, under the statute, it is required to be filed within three years from the decree, saving to infants, married women, etc., a right to a bill of review within three years from the removal of such disability. Mrs. Catherine Wilson, Mrs. Elizabeth Dunham, and Mrs. Mary Hungerford, daughters of Mary Knapp, were, at the date of the decree, laboring under the disability of nonage, but attained their majority in 1879, 1881, and 1883, respectively. It was their right to file a bill of review within three years from the removing of the disability of nonage, but the bill was not filed by them until June 28, 1900. The fact that they are now laboring under the cumulative disability of coverture, and were under said disability in 1891, when the life estate of Mrs. Schaefer terminated, is of no importance. A remainder is a present right, though the

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enjoyment is *in futuro*, and the owner may desire to dispose of it, or in some way make it available to his needs, and, hence, is entitled to have it relieved from a cloud impairing its value, and, perhaps, rendering it wholly unavailable. *Aiken v. Suttle*, 4 Lea, 103. Parties need not wait until the removal of disabilities before filing a bill of review. *Winchester v. Winchester*, 1 Head, 460.

It also appears that Wat. C. Knapp attained his majority more than three years before the bill was filed, and died. It follows that his son, Dillis C. Knapp, one of the present complainants, was, also, barred. So, also, John C. Burnham and Edward L. Burnham were of age more than three years before the bill was filed. Edward L., having died after the bar became complete, left no inheritable interest.

Ruth M. Burnham, who intermarried with Everett D. Cone, did not attain her majority until May 31, 1898, and Roy Burnham became of age June 27, 1900, the day preceding the filing of this bill. The two parties last mentioned are, therefore, not barred; but it is said that Ruth Cone and Roy Burnham are not entitled to maintain a bill of review, for the reason they were not parties to the compromise decree of 1874. *Gibson's Suits in Chancery*, Sec. 1059; *Arnold v. Moyer*, 1 Lea, 310.

They were not parties, for the obvious reason they were not *in esse* when that decree was pronounced, but they were represented by members of a class to which they belonged and hence were

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bound by the decree. Their right to a bill of review is not affected by the statute of limitations.

The complainant also assigns as error the action of the Chancellor in sustaining defendant's second demurrer and holding that the bill could not be maintained, as a bill of review for error apparent, for newly discovered evidence, or for fraud. The authorities are: "In order to sustain a bill of review for error apparent, the decree complained of must be contrary to some statutory enactment (2 Dan. Chy. Pr., 6 Am. Ed., 1576; Story Eq. Pl., Sec. 405; *Freeman v. Clay*, 52 Fed. Rep., 1; *Hoffman v. Knox*, 50 Fed. Rep., 484); or some principle or rule of equity recognized and acknowledged as settled by decision, or be at variance with the forms and practice of the Court. (2 Dan. Chy. Pr., 6 Am. Ed., 1576.) Errors apparent cannot be predicated of merely formal irregularities (*Berdanatti v. Sexton*, 2 Tenn. Chy., 699; *Hargraves v. Lewis*, 7 Ga., 110; *Gary v. May*, 16 O., 66). Nor of matters resting in discretion (*Ashford v. Patton*, 70 Ala., 479; *Clark v. Clark*, 4 Haywood, 36). Nor can a bill of review be maintained by one who is not prejudiced by the decree complained of (*La-Grange R. R. Co. v. Rainey*, 7 Cold., 420; *Livingston v. Noe*, 1 Lea, 55, and *Montgomery v. Olwell*, 1 Tenn. Chy., 169).

"In order to ascertain if there be error in the decree the general practice is to look back of the decree into the whole record of the pleadings and

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proceedings, including orders and Masters' reports, but excluding evidence. Matters of fact cannot be inquired into on a bill of review for error apparent. A party cannot contest the propriety of a decree on the ground that it was not justified by the evidence." *Enochs v. Haralson*, 57 Miss., 465; *Winchester v. Winchester*, 1 Head, 460; *Fuller v. McFarland*, 6 Heis., 79; *Livingston v. Noe*, 1 Lea, 55; *Ward v. Kent*, 6 Lea, 128; *Rodgers v. Dibrell*, 6 Lea, 69; *Berdanatti v. Sexton*, 2 Tenn. Chy., 699; *Drake v. Drake*, 12 Heis., 704; *Anderson v. Tenn. Bank*, 5 Sneed, 661.

"As to newly discovered matter, in order to sustain a bill of review it must be relevant and material, such as would probably have changed the result had it been brought forward, and which was not known to the plaintiff or his attorney, and could not have been known by them by the use of reasonable diligence, in time to be used in the suit." *Puryear v. Puryear*, 5 Bax., 640.

In *Jenkins v. Eldredge*, 3 Story (U. S.), 311, Judge Story says: "It must be evidence bearing directly on the merits of the case and affecting the very foundation of the decree."

"And it must not have been known to the plaintiff or his attorney in time to be used in the suit." *Long v. Granberry*, 2 Tenn. Chy., 85; *Cleveland v. Martin*, 2 Head, 128; *Winchester v. Winchester*, 1 Head, 460.

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“The new matter upon which the bill is founded must be so stated that the Court, upon demurrer, may determine its character and not be left to judge of its sufficiency upon consideration of the additional testimony in connection with the evidence in the original cause.” *Greer v. Turner*, 47 Ark., 29; *Clark v. Garrett*, 6 Lea, 262; *Livingston v. Noe*, 1 Lea, 55; *Burson v. Dosser*, 1 Heis., 761, citing *Long v. Granberry* (by Chancellor Cooper), 2 Tenn. Chy., 86.

“And such a bill to impeach a decree for fraud, termed generally an original bill in the nature of a bill of review, partaking of the character of both classes of bills, is, in its essential features, an original and independent proceeding.” *Haskins v. Rmoe*, 2 Lea, 708.

“But, of course, it is unimportant what the bill is called (*Maddox v. Apperson*, 14 Lea, 598), and the terms, ‘original bill’ and ‘bill of review,’ are frequently in this sense used interchangeably.” *Terry v. Commercial Bank*, 92 U. S., 454.

The difference between a bill of review and a bill to impeach for fraud, the bill now under discussion partaking of the nature of both, is well set out in the case of *Berdanatti v. Sexton*, 2 Tenn. Chy., 704, where the Court says: “The object and effect of a bill for fraud, even if the fraud consists of want of notice, are to vacate the former decree, not to retry the case; whereas, the object and effect of a bill of review are to reverse the

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decree, so far as it is erroneous, and to retry the case upon the original record, or the original record and new proof, as the bill is for error apparent or newly discovered evidence.”

Again, in *Berdanatti v. Sexton*, 2 Tenn. Chy., 704, it was said: “The joinder of the two bills (bills of review and bills to impeach the decree for fraud), having such different objects and effects, is not in consonance with the practice of the Court, and would lead to grave confusion.”

See *Gordon v. Ross*, 63 Ala., 356, where the Court says: “The same defenses cannot be made, the same matters are not open for consideration, the same relief cannot be granted. The object and effects of a bill of review and a bill impeaching a decree for fraud are essentially different. If entertained as a bill of review, the former decree so far as erroneous would be reversed, and the Court would proceed to retry the case, rendering the decree the evidence would authorize. But if fraud has infected the decree, it must be vacated entirely. There is no retrial of the case.

But, treating the bill in this case as properly filed for both purposes, we agree with the Chancellor in his findings on this subject, viz: “I find nothing in the allegations of the bill, taken in connection with the exhibits, to support the charge of fraud in obtaining the decree confirming the compromise. The fraud preceded the compromise, and the compromise was rather in the nature of a rep-

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aration. The Burnham bill contains all the allegations of fraud relied upon here, except that the Court was deceived as to the value of the Illinois property, and as to the fact that the Memphis property was leased, for \$1,000 per annum, to a tenant who was to pay the taxes. This latter fact did not enter into the reason controlling the Court, and I think would not have made any change in the decision. I can see no evidence of bad faith on the part of the witnesses who testified as to the value of the Illinois property. Some of them gave rather a gloomy account of it. They do not testify like witnesses trying to deceive; and then the bill only alleges that the property was not worth more than \$9,000, exclusive of improvements. This might be true, and yet the property be considered by the Court much more valuable to the minors than the Memphis property, valued at \$31,000, subject to a life estate with twenty-one years' expectancy, and liable to over 5 per cent. taxes, whenever taxes should have to be paid. Property was declining, both in Memphis and in Loda, Ill.; there was no demand for real estate at either place. The contest in the proof was rather as to which property was least desirable. Besides, the bill does not show what became of this Illinois property, whether it has been sold, and if so, what was realized. In order to charge fraud in proof of value, the bill should be full, explicit, and candid."

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The newly discovered evidence alleged in the bill is the same that appeared in the consolidated causes, and the Court had knowledge of it when the compromise decree was rendered. It is not shown that any fraud was practiced in procuring the compromise decree, and that is the essential and indispensable condition of impeaching that decree for fraud. We, therefore, hold the bill as insufficient treated as a bill to impeach the decree for fraud, and in saying this we concede that as a bill to impeach the decree for fraud, this Court can look to the entire record of the consolidated causes, including all the proceedings and *proof*.

It is insisted, however, by counsel for complainants that the Court had not jurisdiction to make the compromise decree: "First, because the minors were not parties to any pleading or proceeding upon which said decree can rest, and were not represented by guardian *ad litem*; second, because even if the minors were parties, and were represented by guardian *ad litem*, the decree is not within the scope of the pleadings, and are, therefore, void; third, because there was no issue upon any pleading upon which said decree can rest, and without such issue the decree is *coram non judice*; fourth, because the case of *Jones v. Schaefer* ended with the dismissal of the case as to Jones, and, therefore, the compromise decree cannot be considered as having been made in that cause, for this as well as for other reasons here given; fifth, because the

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Court had neither inherent nor statutory jurisdiction to make said decree, as these proceedings then stood, as to parties and pleadings; sixth, because even if the Court had jurisdiction of the parties, and the pleadings had been in all respects sufficient, the Court had not the statutory or inherent jurisdiction to decree an exchange of real properties; and, seventh, because, even if the Court had jurisdiction to decree an exchange of properties, real estate in Tennessee for other real estate in this State, it had not the jurisdiction to exchange real property in this State for similar property situated in a *foreign jurisdiction*." On this subject the Chancellor held, viz. : "While the question is one of great difficulty, I am constrained to hold that this compromise decree was not within the scope of the pleadings."

Counsel for the defendants assign this holding of the Chancellor as error.

It is not controverted that a decree, outside the scope of the pleadings, is *coram non judice* and void. *Bank v. Carpenter*, 13 Pick., 437; *Randolph v. Bank*, 9 Lea, 63; *Rogers v. Breen*, 9 Heis., 679; *Easley v. Tarkington*, 5 Bax., 592.

But it is contended this rule is not applicable in the present case. It is argued, in the first place, that, in the consolidated causes in which the compromise decree of 1874 was pronounced, the Court had jurisdiction of the parties and subject-matter. It is said further that the purpose of the bill filed by Reuben Jones on September 11, 1871, was to

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perfect Jones' title to these lots; that on April 15, 1873 (before Jones had filed his disclaimer), David Burnham and wife, in their own interest and as next friend for the minor remaindermen then *in esse* filed a cross-bill in this cause, seeking to set aside all the conveyances of this real estate and to recover its possession. Again, that on May 21, 1873, David Burnham and wife, in their own right and as next friends to the minor remaindermen, preferred an original bill against Adam Smith, seeking to cancel the deeds to Jones, and from Jones to Smith, and to recover the lots in suit. On February 19, 1874, the petition of David and Mary Burnham, for themselves and the minor remaindermen, was filed, setting out the proposed compromise. The Court ordered that the petition stand as though filed in the case of David and Mary Burnham v. Adam Smith, and the guardian *ad litem* (Mr. T. B. Turley) was directed to defend and represent the minors in all matters involved in the two causes and in the petition referred to. On motion of the guardian *ad litem*, the names of the minor remaindermen were stricken from the petition, and the petition stood in the name of David and Mary Burnham. It appears, however, that the guardian *ad litem* continued to represent the minors, cross-examining the witnesses on the order of reference, and argued the report, contending, among other things, that, under the will the minors had a present estate in the land, and that Smith was not an innocent purchaser.

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But it is insisted that, though the names of the minors were stricken from the petition proposing the compromise decree, they were before the Court in the two consolidated causes, and, hence, the Court had jurisdiction *in personam*. It is further insisted that the simple issue in the two consolidated causes was in respect of the validity of Smith's title, and who should recover the property in controversy, and it is submitted that, upon this pleading, the compromise decree might well be warranted.

It is further insisted that the subject-matter, the Memphis property, was within the jurisdiction of the Court, and the parties were before the Court upon pleadings which put in issue the title to the property, and that any decree made by the Court settling the question of ownership is valid. It is said the fact that the Court found that other property (outside of the State) had been, or was to be, conveyed to the minor remaindermen does not affect the jurisdiction of the Court over the subject-matter in Tennessee.

The proposition of counsel, therefore, is, if the Court had jurisdiction of the parties and of the subject-matter upon pleadings which are appropriate, the compromise is good. It is well settled by this Court that infants are concluded to the same extent as adult parties by decree of the Chancery Court, and entitled to the same proceedings for the correction of errors therein, and to none others. *Hurt v. Long*, 6 Pick., 445.

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It is said in the latter case, viz.: "Whether a particular decree could or should be rendered was not a jurisdictional question. The right to hear and determine which is jurisdictional, in the sense considered, is one thing; the decree to be rendered upon the evidence offered is another. If the jurisdiction exists, the decree might be erroneous upon the evidence, but not void. So, neither as to the pleadings nor effect of proof in the original cause, do minors stand on any different footing, when they seek to impeach it, than do other suitors." *Ib.*, 460.

Again: Since and before the Code, Chancery Courts "had the jurisdiction to control and sell and consent to the sale of real estate of a minor when it was to his interest." The rule has been uniformly stated that "wherever a Court of Chancery has jurisdiction of the subject-matter in litigation, and has jurisdiction of the parties, as to third persons, its proceedings cannot be held to be void, and in this it is not material whether the jurisdiction be inherent or statutory." *Hurt v. Long*, 6 Pickle, 446; *Kelley v. Kelley*, 15 Lea, 198; *Livingston v. Noe*, 1 Lea, 55; *Fulton v. Davidson*, 3 Heis., 614-641; *McGavock v. Bell*, 3 Cold., 512-518; *Hopper v. Fisher*, 2 Head, 252-256; *Winchester v. Winchester*, 1 Head, 500.

The children of Mrs. Burnham (Mary C. Knapp) were before the Court as defendants in *Jones v.*

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Schaefer et al., and were represented by Mr. Turley as their guardian *ad litem*. These children, with their mother, were also complainants in that cause. They were also parties complainant with their mother in the original bill against Adam Smith. In this cause the Chancellor did not hold that the children of Mrs. Burnham were not parties to the consolidated causes, or represented by guardian *ad litem*, but pronounced the decree void, solely upon the ground that it was outside of the pleadings.

It is conceded by the complainants that the Chancery Court has the inherent jurisdiction to sell the lands of minors or others under disability. *Hurt v. Long*, 6 Pickle. It is conceded, also, that the Chancery Court has the right to compromise the rights of minors in proper cases where they are parties. *Rucker v. Moon*, 1 Heis.; *Reynolds v. Brandon*, 3 Heis., 605.

In Daniells on Chy. Pl. and Pr., vol. 1, p. 67, the author says: "In consequence of their incapacity, persons under disability are unable to compromise their rights or claims; but where these rights and claims are merely equitable, the Courts of Chancery may, in general, order the trust property to be dealt with in whatever form it may consider to be for the benefit of the *cestui que trust*, who are under disability, and, therefore, *has power to compromise such rights or claims*." Chancellor Cooper adds to this his note 1, citing: *Brooke v.*

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Lord Mostyn, 2 De G. J. & S., 373-415 (S. C., 10 Jour. (N. S.), 1114-1116); *Wilton v. Hill*, 35 L. J. Chy., 156; *Wall v. Rodgers*, 9 L. R., Eq., 58.

We are of opinion that the consolidated causes propounded an issue between the minors and Adam Smith, touching the title to the Memphis property, and the compromise decree of 1874, was within the purview of that litigation and the scope of the pleadings. The minors were parties to this cause, and were represented by *guardian ad litem*. It was not necessary that the compromise should have been presented by petition or any special pleading. Nor was it necessary that the *guardian ad litem* should have consented to the compromise. The compromise was made by the mother on her own behalf and as next friend of her children, and, after reference to the Master for the facts and his recommendation, the compromise was ratified by the Court.

The *guardian ad litem* did not except to the report or appeal from the decree of compromise. The record shows he fully developed the case, and faithfully and efficiently represented the interests of the minors.

It is insisted by complainants' counsel that jurisdiction to approve an offered compromise does not exist except upon the consent of *guardian ad litem*, next friend, and counsel. In support of this position, counsel cites *in re Burchnell*, 16 Chy. Div.

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41, viz.: "That case involved personalty, and the Vice Chancellor suggested a compromise, to which the adults consented, but the guardian *ad litem* and counsel objected. Jessel, Master of Rolls, said, 'The Court can approve a compromise on behalf of the infants, but it cannot force one upon them against the opinion of their advisers.'"

The question was there made on the direct appeal of the minors from the decree of an inferior court ordering a settlement over the objections of the guardian *ad litem*. In the present case the decree was not appealed from, and shows upon its face that it was consented to by the next friend of the infants.

In our opinion the compromise decree of 1874 was, to all intents and purposes, a consent decree. The next friend has a right to consent to a settlement affecting the rights of the minors, and when his agreement is ratified and approved by the Court, it becomes binding upon the infant. In *Bigley v. Watson*, 14 Pick., 353, this Court recognized the rule that an adjudication of matters outside the pleadings, is *coram non judice*, but held that this rule does not extend to consent decrees rendered in causes where the Court had jurisdiction of the parties and of the subject-matter, citing *Pacific R. R. v. Ketchum*, 101 U. S., 289; *Railroad v. U. S.*, 113 U. S., 261; 5 Enc. Pl. & Pr., 962; *Boyce v. Stanton*, 15 Lea, 347.

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It matters not, said the Court, that Mrs. Watson was a married woman at the time, for decrees by consent by persons under the disability of coverture or infancy are avoidable alone by original bill, and then only for good reasons shown, citing authorities. In *Tripp v. Gifford*, 155 Mass., 108, S. C., 31 Am. St. Rep., 530, the Court says, viz.: "We see no reason why the next friend should not have authority to institute or entertain negotiations for a settlement of the controversy. His position with reference to it is like that of a general guardian or a guardian *ad litem* of an infant defendant. The next friend is invested with the rights of the infant so far as they are involved in the cause and acts under responsibility both to the Court and to the plaintiff. It may well be considered to be within his official duty to negotiate, if possible, a fair adjustment without subjecting the plaintiff to the expense and risk of a trial."

It was held, however, in that case that the next friend had no right to compromise out of Court the right of the minor, but it was conceded that the next friend might, with the consent of the Court, bind the infant by a compromise of his rights.

Walsh v. Walsh, 116 Mass., 377. This was a bill to review and reverse a decree compromising a minor's rights. Says Gray, C. J.: "In the case before us the first decree, appearing upon its face to have been made, not upon consent of defendants and guardian *ad litem* merely, but upon the repre-

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sentation of counsel and adjudication of the Court that it was a decree fit and proper to be made against the infant, it must be held binding upon them."

Lastly, it is insisted that, conceding the Court had jurisdiction of the parties, and the pleadings were sufficient, the Court had not the inherent or statutory jurisdiction to decree an exchange of real estate, and more especially was it without jurisdiction to exchange real estate in Tennessee for similar property situated in a foreign jurisdiction (to wit, the State of Illinois). But it has been seen that the subject-matter of the consolidated causes, and of the compromise decree, was property situated in Tennessee, and the fact that property in Illinois may have been accepted as a part of the consideration of the compromise did not affect the jurisdiction of the Court. It may have been an error for the Court to have sanctioned the exchange of the lands of the minors situated in Tennessee for lands situated in another State, but this was a matter which did not affect the jurisdiction of the Court, but went to the mode and manner of exercising that jurisdiction. The Court, in ratifying the compromise decree of 1874, had jurisdiction of the parties and of the subject-matter, and an erroneous exercise of the jurisdiction does not affect the validity of the decree.

The result is, the decree of the Chancellor is reversed, the demurrer sustained, and the bill dismissed.

Winters v. Hainer.

WINTERS v. HAINER.

*(Jackson. June 18, 1901.)*1. ADVERSE POSSESSION. *Bars action for land, when.*

Adverse possession for seven years of a portion of a tract of land held under a certificate of tax sale describing the whole tract, accompanied by claim of the whole tract, defeats an action of ejectment against the possessor for any part of the tract.

2. EJECTMENT. *Plaintiff's title.*

The plaintiff cannot recover in ejectment unless he can show a perfect title.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKEILL, Ch.

W. H. CARROLL for Winters, guardian.

W. B. GLISSON and H. F. DIX for Hainer.

WILKES, J. This is an action of ejectment, to recover a tract of about seventy acres of land. Complainants claim as the heirs and devisees of Daniel Hughes, and attempt to deraign their title from him. Defendants claim through B. L. Sloup, and deraign title from him, and also set up adverse possession for more than seven years. It appears

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that the property was sold for taxes on July 10, 1884, and was bought by B. L. Sloup. It was sold as the property of P. Sherry's estate. A certificate of sale was executed September 3, 1884, but was not recorded until November 20, 1893. This certificate gives the boundaries of the land. It is shown by the proof that the purchaser (Sloup) went into possession at once, and remained in possession until he died, in 1885 or 1886. During his lifetime he inclosed nearly all of it, and the balance was inclosed soon after his death by his widow, who inherited the land from him, he never having had any children or heir at law. She has been in the actual adverse possession of the land ever since the bill was brought, December 1, 1893. The tax certificate under which B. L. Sloup went into possession is color of title, with boundaries defined, and the actual inclosure and adverse possession of the greater part of the land is shown, and the defendants are entitled to hold, not only to the extent of their holding under actual inclosure, but have title to the extent of the boundaries set out in the color of title, as against all persons not under disability. It appears, however, that a portion at least of complainants were minors when the adverse possession began, and are minors still, and as to them the bar would not apply. But we do not find that complainants can deraign a perfect title, and they must recover, if at all, upon the strength of their title.

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It appears that Daniel Hughes claimed some land under tax title sale made in 1856. The land embraced in that title is not identified as the land now in controversy. Indeed, the land is there described as lying in the fifth civil district of Shelby County, whereas the land in controversy lies in the fifteenth civil district. The boundaries as there given are not shown to embrace the land in controversy. We are not able to connect the tax title with that of Frayzer.

The title as made out by complainant is not in other respects a perfect title, such as will support this action, and the decree of the Court below is affirmed, with costs.

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110	337

FREEMAN v. RAILROAD.

(Jackson. June 21, 1901.)

1. NEW TRIAL. *Motion for, waived, when.*

A motion for new trial is waived when made at same time and in same record entry with motion in arrest of judgment. (*Post*, p. 344.)

Cases cited: *Snapp v. Moore*, 2 Overton, 236; *Ins. Co. v. Crunk*, 91 Tenn., 378.

2. DAMAGES. *For death, how distributed.*

Damages recoverable for the negligent killing of a person pass, in the absence of surviving widow or children or father, as other personalty, under the laws relating to the distribution of decedents' estates, to the mother and brothers and sisters of the deceased. Hence, in a case averring absence of widow, children, and father, and survivorship of mother, brother, and sister, it was not error to admit proof of the existence of the brother and sister. (*Post*, pp. 334, 335.)

Code construed: §§ 4025-4029, 4172 (S.); §§ 3130-3134, 3278 (M. & V.); §§ 2291-2293, 2429 (T. & S.)

Cases cited: *Railroad v. Bean*, 94 Tenn., 395; *Loague v. Railroad*, 91 Tenn., 461.

3. FELLOW-SERVANT. *Who are not.*

The members of a bridge crew, whose duties were to repair bridges, trestles, etc., on a line of railroad, operating for that purpose a construction train, are not fellow-servants of the conductor and engineer of a freight train operating on such road. (*Post*, p. 346.)

Cases cited: *Railroad v. Carroll*, 6 Heis., 347; *Railroad v. DeArmond*, 86 Tenn., 73; *Taylor v. Railroad*, 93 Tenn., 307.

4. CONTRIBUTORY NEGLIGENCE. *Does not exist, when.*

A member of a bridge crew, crushed by a backing switch train, while engaged in loading heavy timbers on a car of the construction train, standing on a sidetrack, is not guilty of contributory negligence, by reason of his failure to look and listen

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for the approach of the switch train, or by reason of his occupying the track while at work, that being the most effective and convenient method of conducting it. (*Post*, pp. 346, 347.)

5. PROXIMATE CAUSE. *What is.*

The rapid and reckless backing of a freight train against cars standing on a side track, without signal and warning, thereby crushing and killing a member of a bridge crew, engaged in loading a construction car on said track, is the proximate cause of the injury, and not the mere fact of the deceased's presence on the track. (*Post*, pp. 346, 347.)

Case cited: *Taylor v. Railroad*, 93 Tenn., 312.

6. MASTER AND SERVANT. *Master's duty as to place to work.*

The servant has the right to assume that he would be given a safe place to work, and that it would be kept safe while he was engaged. (*Post*, p. 347.)

7. MEASURE OF DAMAGES. *Recoverable for death.*

The measure of damages recoverable for the negligent killing of a person is (1) such as the deceased would have been entitled to if he had survived; (2) such as the parties suing would have been entitled to in their own right. Next of kin cannot recover for their own physical suffering and mental anguish resulting from the death. (*Post*, p. 348.)

FROM WEAKLEY.

Appeal from Circuit Court of Weakley County.
W. H. SWIGGART, J.

JOSEPH E. JONES, A. A. HORNSBY, and FENTRESS
& COOPER for the Railroad.

R. E. MAIDEN and F. P. HALL for Freeman.

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WILKES, J. This is an action for damages for personal injury resulting in the immediate death of B. T. Robertson. It is brought by his administrator, for the benefit of his next of kin, who are stated to be his mother and brother and sister. There was a trial before the Court and a jury, and a verdict and judgment for \$1,999, the amount sued for, and the Railroad Company has appealed and assigned errors. While quite a number of errors are assigned, only a few of them are material or need be considered.

The facts necessary to be stated are, that Robertson was in the employ of the road as one of a bridge crew, whose duty it was to go up and down the road repairing bridges, trestles, etc. It was necessary, in the discharge of his duties, to load and unload timbers and lumber along the line of the road. It appears that on the morning of the accident the deceased, with several others, was engaged in loading timbers upon a flat car at Obion Station. Three or four box cars were attached to the flat car, and they were standing upon a side track about thirty feet north of where it was crossed by Main street, one of the most public thoroughfares in the town. The crew was in charge of a *pro tem* foreman named Burton. The timber being loaded was quite heavy, some being fourteen feet long and twelve inches square. Two of the laborers stood upon the flat car to receive the timbers, and others stood upon the ground to

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push and lift them up. They were not furnished with any skids, and, having to lift the heavy timbers, it was easier to raise them up and push them on the car from the end than from the side.

While the deceased, with some others, was standing between the tracks, in front of the car loading timbers from the end, a local freight backed in on the track on which the flat car and box cars were standing, for the purpose of coupling to them. This train came in at a rapid and unusual rate of speed, without warning or signal, and struck the box cars with violence, and caused them to push the flat car back against the deceased, running over him and crushing him, as he was engaged in the act of loading a piece of timber on the flat. The view of the deceased, as well as the other hands engaged in loading was obstructed by the box cars, which intervened between them and the incoming train, so that they did not know of its approach. It seems that the train struck the standing cars with such force as to derail the south end of the flat car by knocking it off the track about five feet, or it was thrown off by running over the deceased. The evidence is quite clear that the conductor and engineer of the train knew that these parties were engaged in loading the flat car, and it is also clear that the bridge crew had no connection with the employes operating the train.

We are of opinion the appellant is not in position to question the findings of the jury upon the evidence.

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It appears that its motions for a new trial and in arrest of judgment were made at the same time and in the same motion. A motion for a new trial and in arrest of judgment cannot be made together and at the same time, and a motion in arrest of judgment is a waiver of a motion for a new trial. *Snapp v. Moon*, 2 Overton, 236; *Ins. Co. v. Crunk*, 7 Pick., 378. But it is not seriously insisted that there is no evidence to support the verdict so far as the negligence of the company is involved, but the defense is on other grounds.

The declaration avers that the deceased left no widow or children or father surviving him, but left a mother, brother and sister. The contention was made in the Court below, and in this Court, that the mother was the next of kin to the defendant, and that it was error to allow the plaintiff to show that deceased had a brother and sister, as they could have no interest in the recovery, and that the fact that there was a brother and sister induced the jury to give greater damages than they otherwise would have given.

We think that the conclusion is hardly warranted upon any reasonable hypothesis, and cannot see that the fact would have at all increased the amount of damages awarded, and such assumption is not well grounded.

The action in the case is based on the provisions of the statute (Shannon, Sections 4025 to 4029 inclusive). These sections prescribe the persons for

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whose benefit the action may be brought, and in substance that the right of action vests primarily in the widow, next in the children, or in the personal representative for the benefit of the widow or next of kin.

It has been held that, if no widow or children survive, then the right of action belongs to the father, or the personal representative, for the use and benefit of the father, as next of kin. *Railroad v. Bean*, 10 Pick., 395, 396.

The Judge was of opinion these sections of the Code should be construed in connection with and in the light of the statutes relating to the distribution of estates. Subsection 5 of Section 4172 provides that, in the distribution of personal estates: "If there is no father, the property shall go to the mother and brothers and sisters, or the children of such brothers and sisters representing them, equally, the mother taking an equal share with each brother and sister."

We think this is the proper view of the statutes. The recovery, when realized, becomes personal property, and follows the usual course of distribution of personalty. *Loague v. Railroad*, 7 Pick., 461; *Railroad v. Bean*, 10 Pick., 388. The parties who are entitled to take under the statutes of distribution are, in the contemplation of the other statutes, the next of kin, and there was no error in allowing evidence to show that there was a brother and sister of the deceased, as well as a mother.

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We think the deceased was not a fellow-servant with the conductor and engineer of the train. They were in separate and independent departments. They had no connection with each other in their work and duties. *Railroad Co. v. Carroll*, 6 Heis., 347; *Railroad Co. v. DeArmond*, 2 Pick., 73. It has been held that a car inspector is not a fellow-servant with the crew of a switch engine in the same yard, although it was his duty to inspect the cars pulled around and about by the engine, and have cars placed for repairs. *Taylor v. Railroad Co.*, 9 Pick., 307. The bridge crew had nothing to do with the operation of the trains. The train men had nothing to do with the bridge crew. Their duties and labors were entirely distinct and separate. But it was the duty of the deceased, as well as the other members of the bridge crew, to load their timbers, and they were so engaged when the injury was done.

It is said that the deceased was guilty of contributory negligence in placing himself in front of the car which was being loaded, and between the tracks, instead of standing at the side of the car and placing the timbers from that position. The charge left it to the jury to pass upon the question of contributory negligence and proximate cause. But we do not think that this contention is well made. It is shown that, owing to the size and weight of the timbers, it was much easier to load them from the end than from the side of the car. The train hands knew that this car was being loaded, and that

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the bridge crew was engaged in the work. There was no care taken in backing down to the standing cars. The speed was rapid, not to say reckless. There was no signal nor warning given of any kind. The deceased thought himself in a place of safety, and was, but for the negligent acts of the train men.

The obligation to look and listen, in the sense in which that duty is placed upon persons who enter upon the tracks of a railroad, was not applicable in this case. The deceased could not look and listen, and, at the same time, load the cars. He had the right to assume that he would be given a safe place to work, and that it would be kept safe while he was engaged. Moreover, his being at the end of the car and between the tracks was not, under the evidence in this case, the proximate cause of the accident, but the rapid, reckless running of the train back upon the standing cars, without signal or warning. With proper care and caution on the part of the train hands, the coupling could have been made without risk or damage to the deceased. *Taylor v. Railroad*, 9 Pick., 312.

It is said that the Court should have charged the jury that the mother and brother and sister of the deceased were not entitled to the wages of deceased as a matter of law, and that they were not dependant upon him in a legal sense. It is only necessary to say that no such claim was made in the declaration, and damages were not sought upon this ground.

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Evidence was introduced to show the earning capacity of the deceased, and, without any objection, it was shown that he supported his mother, and the witnesses were cross-examined upon this point, and no exceptions were made to the evidence.

The damages recoverable in such case are those which the deceased would have been entitled to had he survived, as well as those which the parties suing would have been entitled to in their own right. It does not appear that anything more was allowed than would have been recoverable in right of the deceased, and the recovery is small compared to the injury done, and the reckless manner in which it was done.

We think that the general charge sufficiently instructed the jury that they could give no damages for the physical suffering or mental anguish of the next of kin. It was not insisted that damages could be awarded for this, and there is no evidence that it was taken into consideration by the jury.

We have not commented on the several requests separately, but would simply say that the charge is full and accurate upon the material features of the case, and the special requests were not material and some of them not correct, and we see no error in the proceedings and the judgment of the Court below, and the judgment is affirmed with costs.

Brown v. Brown.

BROWN v. BROWN.*(Jackson. May 25, 1901.)***1. RESULTING TRUST. Waived, when.**

A resulting trust is waived by the party, in whose favor it arises, accepting a mortgage on the land for the amount due him.
(*Post*, pp. 351, 352.)

Cases cited: *Gregg v. Jones*, 5 Heis., 443; *Lane v. Logue*, 12 Lea, 685.

2. MORTGAGES AND DEEDS OF TRUST. Not barred, when.

The foreclosure of a mortgage, which secures past due debts, is not barred by the lapse of ten years from its date, where it provides for its enforcement by sale of the lands after six months' notice to the debtor to pay the debts secured and the required notice has not been given. The statute begins to run in such case only from expiration of the six months' notice.
(*Post*, pp. 350-352, 353.)

Act construed: Acts 1885, Ch. 9.

Case cited: *Johnston v. Grosvenor*, 105 Tenn., 362.

FROM MADISON.

Appeal from Chancery Court of Madison County.

A. G. HAWKINS, Ch.

BULLOCK & TIMBERLAKE for complainant.

JOHN L. BROWN for defendant.

McALISTER, J. This bill was filed to foreclose a deed of trust. A demurrer was interposed by

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the guardian *ad litem* of the minor defendant, assigning as cause: (1) That the deed of trust was barred by the statute of limitations; (2) that the deed of trust required six months' notice of demand of payment, and that this provision was not complied with. The Chancellor sustained the demurrer, adjudging that the trust deed was barred, and dismissed the bill as to all parties.

It is insisted in this Court, on behalf of complainants, that the Act of 1885, barring deeds of trust, mortgages, etc., in ten years, provides that it must be enforced within ten years *from the maturity of the debt*, and not within ten years from the date of the instrument. It is insisted in the present case that the deed of trust provides that the right to foreclose does not accrue until after six months' notice to pay has been given the maker. No specific time for the payment of the debt is expressed in the trust deed. All of the debts secured were past due at the date of the trust deed. The only provision of the trust deed touching the maturity of the debts is, viz.: "Now, should I pay or cause to be paid any or all of the aforesaid sums set out, after six months' notice to me to pay the same by any or all of the said parties, severally or jointly, then this conveyance to be void; otherwise to remain in full force and effect."

It is shown by the bill that no demand was ever made, or notice given as provided by the trust deed, and two reasons are given for this omission,

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namely: (1) That, while complainants were aware that a conveyance had been made for their benefit, they were under the impression that, instead of it being a trust deed, it was a deed reserving to the grantor a life estate; (2) that the grantor was the father of complainants, and they were unwilling to foreclose the deed of trust in his lifetime; (3) it is further insisted that, since the death of their father, no administrator has been appointed, and there has been no one to whom they could make a demand for the payment of said indebtedness.

Again, it is argued the trust deed is not barred by the statute of ten years for two reasons. First, it appears from the face of the trust deed that L. L. Brown, the maker, purchased the land conveyed with funds held by him as guardian, which fund belonged to claimants, and they insist that, by the use of said money in purchasing the land, a resulting trust was created in favor of complainants, and that no statute of limitations will bar a resulting trust. But the execution of the deed of trust on the land so purchased with the funds of complainants, and the acceptance by them of that deed of trust, was the acceptance of a security for their money, which they held under the provisions of the trust deed. So that their rights must be determined by the trust deed, and not upon the principles of a resulting trust. An analogy may be found in the case of a vendor's lien. If the vendor give a bond for title, or take a mortgage or deed of trust to

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secure his purchase money, what is known as the vendors's lien no longer exists. The vendor's security in the one case is the title retained, in the other case the title is conveyed for his security. White's Equity Cases, 244; Adams' Equity, side page 128, note 2; *Little v. Brown*, 2 Leigh, 353. If the vendor takes a mortgage upon the land sold, it is as much a waiver of his lien as if he were to take personal security or a mortgage upon other lands. Adams' Equity, side page 128, note 2; 2 Vernon, 281. These principles were recognized and applied in the case of *Anna Gregg v. Charles Jones*, 5 Heis., 443. See, also, *Lane v. Logue*, 12 Lea, 685. So that the acceptance of a deed of trust on this land was, in our opinion, a waiver of any right that complainant might have to set up a resulting trust. And the question remains whether or not the deed of trust is barred by the statute of ten years.

The statute provides that the trust deed shall be barred unless the suit is brought within ten years from the maturity of the debt. In the present case the trust deed provides, viz.: "Now, should I pay or cause to be paid any or all of the aforesaid sums above set out, after six months' notice to me to pay the same, by any or all of the said parties, severally or jointly, then this conveyance to be null and void, otherwise to remain in full force and effect." It will be observed that the right to foreclose this deed of trust does not accrue until six months after notice

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to pay or demand has been made upon the maker.

No specific time is fixed in the trust deed for the maturity of the debts therein secured, and, until demand of payment was made, they had not matured, in the sense of the statute. In *Johnston v. Grosvenor*, 21 Pickle, 362, it was insisted the deed of trust sought to be foreclosed was barred by the statute of ten years. We said that a conclusive answer to that contention was that no definite time was fixed in the trust deed for the maturity of the debt. It is true, said the Court, the note secured by the trust deed is dated in 1884, and is payable one day after date, but, under the scheme of building and loan associations, it was not expected that the note would be paid or the debt mature at once. The agreement of the mortgagor is to make his monthly payments until the stock matures, and he undertakes to secure the payment of a series of small sums during an indefinite period. "Since a building association loan is intended not to be repaid, but to be extinguished by the maturity of the borrowed stock, it does not fall due until that event occurs, when there is default in the payment of dues, interest, or other charges, or the association becomes insolvent or is dissolved, thus creating a breach of the contract, and, consequently, the mortgage given to secure the loan cannot be foreclosed until the happening of one of these events," etc.

The time fixed in the present deed of trust for the maturity of the deed was when demand of pay-

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ment should be made, and, as no such demand was made during the life of the maker, we hold this trust deed is not barred.

The decree of the Chancellor is reversed, the demurrer overruled, and the cause remanded.

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HASCALL v. HAFFORD.

*(Jackson. May 25, 1901.*1. HUSBAND AND WIFE. *Wife's domicile.*

The husband's domicile determines that of the wife, regardless of the place of her actual residence. (*Post pp. 356, 357.*)

Case cited: *Farris v. Sipes*, 99 Tenn., 298.

2. SAME. *Exemptions allowed only to widow of resident.*

Exemptions of homestead, etc., and provision for a years' support made by Constitution or statutes in favor of widows, inure to the benefit of the widows of residents, and not to the widows of nonresidents. (*Post, p. 357.*)

Cases cited: *Graham v. Stuhl*, 92 Tenn., 673; *Farris v. Sipes*, 99 Tenn., 298.

3. HOMESTEAD. *Nonresident not entitled to.*

To constitute one a resident of the State, entitling him and his widow to homestead, he must have acquired a domicile in the State in the sense of residing here with intention to remain permanently. It is not sufficient that he has a mere home or habitation in the State, with no intention of immediate removal. (*Post, pp. 359-363.*)

Case cited: *Stratton v. Brigham*, 2 Sneed, 421.

4. DOMICILE. *Does not exist, when.*

Domicile within the meaning of the homestead laws does not exist in favor of a person or his widow, although he had lived in the State for several years, voted in a primary election, and was elected to the office of Alderman, which he declined, when it appears that he had never moved his family into the State, and had repeatedly declared that he had come into the State for temporary business purposes, and expected to return to his former place of residence when his purposes were accomplished. (*Post, pp. 359-363.*)

Case cited: *Devine v. Dennis*, 1 Shan. Cas., 378.

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5. CHANCERY PLEADING AND PRACTICE. *Concurrent finding of Court and Master.*

The rule as to concurrent finding of Chancellor and Master has no application when the concurrence is as to a fact, or, rather, mixed question of law and fact, which should have been determined by the Chancellor without a reference. Hence such concurrent finding as to fact, or question of domicile or residence, will be utterly disregarded. (*Post*, pp. 358, 359.)

FROM LAUDERDALE.

Appeal from the Chancery Court of Lauderdale County. JOHN S. COOPER, Ch.

SCRUGGS & ROSEBROUGH and W. G. LYNN for Hascall.

WATSON & FITZHUGH, M. M. MARSHALL, THOMAS STEELE, BLAIR PIERSON, C. P. MCKINNEY, KIRKPATRICK & TANNER, and J. W. WATKINS for Hafford.

McALISTER, J. The question presented for determination upon this record is, whether Bella Hascall, widow of H. C. Hascall, is entitled to homestead, the exempt property, and to a year's support out of the estate of her deceased husband. The solution of this question involves the further inquiry, whether the said H. C. Hascall, at the time of his death, was a citizen of the State of Tennessee. It is conceded that the said Bella Hascall, at the time

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of her husband's death, was a resident of the State of Michigan; but, if the husband was a citizen of the State of Tennessee, this fact, as matter of law, determines the domicile of the wife. *Farris v. Sipes*, 15 Pickle, 298. It is settled in this State that the statute providing for a year's support for the widow applies only to the widow of such person as may be residing in Tennessee at the time of his death, and does not apply to the widow of a nonresident. *Graham v. Stuhl*, 8 Pickle, 680. So in *Farris v. Sipes*, 15 Pickle, 298, it was held that the constitutional provision and statutes exempting homestead inure to the benefit of citizens, and nonresidents are excluded from their operation.

It appears from the record that H. C. Hascall died in Lauderdale County, Tennessee, on November 13, 1899, and, by last will and testament, devised his entire estate, both real and personal, to his wife, Bella Hascall. The testator left surviving him six children, two of whom are minors. The will was duly admitted to probate, and the widow dissented therefrom. Coleman Hafford qualified as administrator, and filed a bill in the Chancery Court for the administration of the estate. The widow claimed the homestead, the exempt property, and a year's support out of the assets of the estate. The administrator resisted the claim of the widow, on the ground that the testator and his wife, at the time of his death, were residents and citizens of the State of Michigan. Mrs. Hascall averred that her husband,

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the said H. C. Hascall, was, at the time of his death, a resident citizen of Gates, Tennessee, where he had been engaged in the manufacturing business many years.

Respondent admitted that she resided at Flint, in the State of Michigan, and had remained there, at her husband's request, for the purpose of completing the education of their children; that from time to time she had contemplated taking up her permanent residence with her husband at Gates, Tenn., but had delayed doing so until the education of their children might be finished. During the progress of the cause, a reference was made to the Master to take proof and report whether or not H. C. Hascall was a citizen of the State of Tennessee at the time of his death, or whether he and his family were citizens of Flint, Michigan, and only temporarily in Lauderdale County, Tennessee. In obedience to this reference, the Master reported that H. C. Hascall was not a citizen of Tennessee at his death, but that he and his family were citizens of Flint, Mich. Exceptions were filed to this report by counsel for the widow, and also by the guardian *ad litem* for the minors, which exceptions were overruled by the Chancellor, and the report confirmed. This action of the Chancellor is assigned as error. On the other hand, it is insisted by counsel for the administrator that this is a concurrent finding by Master and Chancellor on a question of fact, which is conclusive and binding on this Court. This rule of

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practice is not applicable in the present instance. The Chancellor, without settling the principles of law for the guidance of the Master, erroneously referred the whole matter for proof and report. It is the duty of the Court to settle issues addressed to him before a reference to the Master is ordered. The question of residence or nonresidence of H. C. Hascall, was a mixed question of law and fact, and was for the determination of the Court upon the proof.

We are not, therefore, concluded by the concurrent finding of Master and Chancellor on this subject, since it was not a proper question to be referred to the Master. So that, disregarding the report of the Master, we proceed to examine the question as an original proposition. It is said, in the first place, that there is a distinction between citizen and resident, and that the latter term was used by this Court in *Graham v. Stuhl*. It was held in that case that the statute, providing for a year's support for the widow, applies only to the widow of such person as may be *residing* in Tennessee at the time of his death, and does not apply to the widow of a *nonresident*. But it is very clear that this Court, in the latter case, used the word residence as interchangeable with domicile, and did not intend to draw any distinction between the terms citizen and resident. It is true this distinction has been recognized by this Court in attachment cases. In *Stratton v. Brigham*, 2 Sneed,

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421, Judge Totten said: "There is, no doubt, a distinction between residence and domicile. Domicile is the habitation fixed in any place with an intention of always staying there. In this sense he who stops, even for a long time in a place for the management of his affairs, has only a habitation there, but no domicile. Thus the envoy of a foreign prince has not his domicile at the court where he resides. This is national domicile, in the sense of the public law, by which the national character of the person and the right of succession to movable property, are determined. But when used in connection with subjects of domestic policy, as taxation, settlement, voting and the attachment law, the word domicile has a more confined and restricted meaning and implies the same as residence; that is, the home or habitation fixed in any place without a present intention of removing therefrom."

It was held that a defendant in an attachment bill who had moved his family and effects to this State from the State of his former abode, hired servants, rented a house for a year, with the privilege of retaining it longer, opened an account at the bank, rented a box at the postoffice, and had undertaken and was engaged in prosecuting a railroad contract, which might occupy two or more years, was held to be a nonresident in the sense of our attachment laws. That was an attachment bill against the defendant as a nonresident. It was held he was a nonresident. See *Southern Railroad Co.*

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v. *McDonald*, 59 S. W. R., 370, where the defendant was held to be a nonresident in the sense of our attachment laws, although he claimed to be only temporarily absent from the State.

But this distinction is not applicable to cases of homestead and exemption, but the question in such cases is one of domicile. Mr. Brown, in his Law Dictionary (Rawles' Revision), page 905, defines resident as a person coming into a place with intention to establish his domicile or permanent residence, and who, in consequence, actually remains there. Time is not so essential as the intent, executed by making or beginning an actual establishment, though it be abandoned in a longer or shorter period." Domicile is defined as that "place where a man has his true, fixed, and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." So that, at last, the question is whether the deceased had acquired a domicile in this State; for, in order to be a citizen or resident, the party must have acquired a domicile. To constitute domicile, two things must concur—residence and intention to make it home of party.

It appears from the record that, when the deceased removed to Tennessee, he left his wife and children at their home in Flint, Michigan, where he had always lived. The family remained there until the date of H. C. Hascall's death; but in the meantime, they occasionally visited each other, back and

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forth. The object of H. C. Hascall in coming to Tennessee was to avail himself of its timbered lands in executing certain contracts with the Standard Oil Company, to furnish staves and headings. His business associates—those most intimately connected with him during his sojourn in Lauderdale County—testify to repeated declarations by him that his home was in Flint, Michigan, and that he was only temporarily in the State of Tennessee, to make money. It is also shown in proof that, during the last illness of H. C. Hascall, his wife visited him in Tennessee, and expressed her purpose to take him back to Michigan to live in the event he recovered. The principal facts relied on to show that deceased had acquired a domicile in this State are: (1) That he lived here for several years, and (2) that he once voted in a primary election, and (3) that he was once elected alderman of the town of Gates. It should be stated, however, that he refused to accept the office of alderman and declined to serve. But we think the declarations of deceased in respect of his home and his intention to return to it outweigh the fact of voting in a primary or running for office, as indicating the real purpose of the party. It was held in *Divine et al. v. Dennis*, 1 Shannon, 378, that facts indicating that a party was a permanent citizen of Tennessee—such as voting in our elections, suing and being sued in our Courts, paying taxes, and renting land, etc—are overcome by his repeated declarations that he was a citizen of Ken-

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tucky and of his purpose to return to that State when his government contract was finished," etc.

We are of opinion the Chancellor was correct in holding that H. C. Hascall was, at the time of his death, a nonresident of Tennessee, and that his widow was, therefore, not entitled to homestead, exempt property, or year's support.

Affirmed.

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MYERS v. TAYLOR.

(*Jackson*. June 15, 1901.)

1. CHARGE OF COURT. *Refusal of requests proper, when.*

The Court's refusal or failure to give special instructions requested before, and not insisted upon after, the regular charge is given is not error. (*Post*, p. 366.)

2. CONTRACT. *Part in writing and part in parol.*

Morrison addressed this proposition to Myers, viz.: "I want to put a mill on your land, and buy the timbers you have in township 8 north (describing the land), timbers to be paid for as fast as cut. Lumber to be shipped green to any responsible firm, and your stumpage to be paid you by said firm. You are to be notified where lumber is to be sold before lumber is shipped. Please make me price per thousand feet on oak." Myers replied: "White oak, \$2 per thousand; red oak, \$1.50 per thousand." *Held*, These writings constitute no such completed contract as will exclude parol evidence of a subsequent arrangement by which title to the lumber was to remain in the seller until the purchase price was paid. (*Post*, pp. 366-369.)

3. SAME. *Same.*

A contract partly in writing and partly in parol is treated as a parol contract. (*Post*, p. 369.)

Case cited: *Smith v. O'Donnell*, 8 Lea, 468.

4. EVIDENCE. *Parol in connection with written contract.*

The general rule that parol evidence is not admissible to contradict, vary, or add to the terms of a written contract is not applicable where the contract comes in question among strangers to it, and there are exceptions to the rule in its application to the parties to the contract. (*Post*, pp. 369, 370.)

Cases cited: *Leineau v. Smart*, 11 Hum., 308; *Hines v. Wilcox*, 100 Tenn., 524.

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5. SAME. *Erroneous exclusion cured, when.*

Where this Court can see that the injury resulting from erroneous exclusion of evidence has been cured by remittitur of part of recovery there will be no reversal for such error. (*Post*, p. 370.)

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. L. A. ESTES, J.

MYERS & BANKS and WILKERSON & McGEHEE.
for Myers.

PERCY & WATKINS for Taylor.

BEARD, J. This action was brought by defendants in error against the plaintiffs in error, for the alleged conversion by the latter of two hundred thousand feet of lumber, of which the former (Taylor & Crate) claimed to be the owners. The conversion complained of was made through a replevin suit instituted by the plaintiffs in error, in a Court of Record of the State of Arkansas, within which jurisdiction of the lumber was then located. To this suit Taylor & Crate were not parties. The theory of defense was, that the lumber in controversy was made by one Morrison, at his sawmill in Arkansas, from logs cut from trees taken from the lands of the defendants in that State, under a special

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contract by which the defendants were to retain title until Morrison had paid them "stumpage" or the full price of the logs so taken, and that their possession of the lumber was rightful, inasmuch as the stumpage was still due. On the other hand, the contention of the plaintiffs below was, that they had purchased the lumber from Morrison, who had unrestricted right to sell the same, and that the caption, by the defendants through their replevin suit, of this lumber and subsequent sale thereof, was a conversion.

The trial below resulted in a verdict and judgment for the plaintiffs. The defendants have brought the suit to this Court and have assigned seventeen errors upon the action of the Circuit Judge. The last eight of these errors are based on the refusal of the Court to grant as many special requests; these assignments, however, will not be considered, as the record affirmatively shows that the requests were submitted to the trial Judge *before* he gave his general charge, and not afterwards, as, has been often declared, is the correct practice. Of the remaining nine assignments only the seventh and eighth will be noticed, as they are determinative of the case in this Court, and the others are immaterial.

The seventh assignment of error is upon the action of the Court in refusing to let the witness, Morrison, testify as to the terms of the contract between himself and the defendant, under which the timber was cut from their land, the trial Judge

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saying, "You have 'that thing' (the contract) in writing, and you can't let the witness testify about it when you have it in writing."

The eighth assignment is upon the part of the Court's charge bearing on this contract, which is as follows: "The contract in this case is in writing, and by its terms D. E. Myers sold to O. M. Morrison the white and red oak on his and the lands of the other defendants, to be manufactured into lumber and sold. The white oak was to be paid for at \$2 per thousand, and the red oak at \$1.50 per thousand. The written contract in this case is a contract for an absolute sale. Defendants insist that title to the lumber was retained by them until the price they sold to Morrison was paid. This could be done only by making such contract after the written contract was made, by which such title was retained. This could have been done any time before Morrison became involved with other people in selling the lumber to them."

The record shows that Myers and the other defendants were the owners of certain land in the State of Arkansas, and that Morrison, desirous of cutting trees from this land, to convert into lumber, in the absence of Meyers from his office in Memphis, left for him the following proposition in writing, viz.: "I want to put mill on your land and buy the timbers you have in township 8 north, range 6 east, sec. 12, sec. 1, sec. 2, sec. 3, sec. 4, sec. 5. Timbers to be paid for as fast as cut.

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Lumber to be shipped green to any responsible firm, and your stumpage to be paid you by said firm. You are to be notified where lumber is to be sold before lumber is shipped. Please make me price per thousand feet on oak.

“Yours, O. M. MORRISON.”

“White oak, \$2 per thousand; red oak, \$1.50 per thousand. D. E. MEYERS.”

On receiving this writing, and after consultation with his associates, Meyers wrote at the bottom of the proposition, as is seen above: “White oak, \$2 per thousand; red oak, \$1.50 per thousand. D. E. Meyers.” Subsequently, on Morrison’s return, this paper was delivered to him, and the record tends to show the contract was then made as to the retention of title. It was evidence to this effect which the Circuit Judge excluded from the jury. In this act of exclusion, as well as in his charge to the jury, set out above, he was in error.

The written proposition made by Morrison and the memorandum of Captain Meyers did not make a contract. This, we think, can be made very clear. Suppose, after Meyers had made his memorandum at the foot of this paper, and its delivery to Morrison, without more, Morrison had declined to go on with this venture, could Meyers and his associates have maintained a suit for its breach? Unquestionably, not. Morrison had simply expressed a desire to buy the timber “in Township North E,”

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but he fixed no price he was willing to pay. On the contrary, he said to Meyers, "Please make me price per thousand feet on oak." In answer to this, Meyers, in his memorandum, gives the price of both white and red oak, while Morrison had only called for price on white oak. The minds of the parties had not yet met. It was for Morrison to determine, upon seeing this memorandum, whether he would take both kinds of oak and pay these prices; and this determination is not expressed in the writing, but, if communicated, it was by word of mouth. The contract, as made, therefore, fell directly within the authority of *Smith v. O'Donnell*, 8 Lea, 468: "A contract may be partly in writing and partly in parol, in which it is ever an oral contract. . . . This will be the case where the writing is imperfect or incomplete. In such cases the writing and parol testimony are competent to show the entire contract."

But there is another distinct ground upon which this exclusion of this testimony was erroneous. The rule invoked by Taylor & Crate, and which the Circuit Judge enforced, has no application in a litigation between them—strangers, as they were, to this contract—and Meyers and others, parties to it. It applies only in controversies with regard to written contracts between the parties, promisor and promisee. 1 Green. on Evidence, p. 279; 2 N. H. v. Evidence, Sec. 923; *Reynolds v. Magness*, 24 N. C., 30; *McMaster v. Insurance Co.*, 55 N. Y., 222;

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Badys v. Jones, 12 Pickering, 371. And, even in a litigation between the parties to the written contract, there are exceptions to the general rule, as well recognized as the rule itself, as may be seen by the reference to *Leinean v. Smart*, 11 Hum., 308; *Ferguson v. Rafferty*, 128 Pa. St., 337 (S. C., 6 L. R. A., 33); *Hines v. Wilcox*, 100 Tenn., 524.

As the case goes back for a new trial, it is proper to say, that the records in *McCoy and Waldrap v. Morrison*, and *Meyers v. Morrison*, the rejection of which is the subject of the fourth, fifth and sixth assignments of error, should have been permitted to go to the jury, on the question of the mitigation of damages, but the error in excluding them is not reversible, because the Circuit Judge required a remittiter from the plaintiffs after verdict, and in this way gave the defendants below the full advantage, which they would have obtained from their admission.

For the error in the exclusion of the testimony of Morrison, pointed out, as well as for error in the charge quoted above, the judgment of the lower Court is reversed, and the cause is remanded for a new trial.

Bennett v. Mass. Mutual Life Ins. Co.

BENNETT v. MASS. MUTUAL LIFE INS. CO.

(Jackson. June 15, 1901.)

1. EVIDENCE. *Parol admissible.*

In an action to rescind a written contract on the ground that it did not, by reason of fraud, express the real intention and meaning of the parties, it is competent to show by parol the true and real contract made by the parties. (*Post*, pp. 373, 374.)

Cases cited: *McKenzie v. Planters' Ins. Co.*, 9 Heis., 261; *Barnard v. Roane Iron Works*, 85 Tenn., 139.

2. SAME. *Sufficiency of.*

In an action to rescind a written contract on the ground that, by reason of fraud, it did not express the intention of the parties, a decree in favor of complainant will be sustained upon the testimony of himself alone, proving the real contract different from that expressed in the writings, especially where he shows the presence of agents of the other party at the making of the contract, who are not offered to contradict him. (*Post*, pp. 373-375.)

Cases cited: *Chapman v. McAdams*, 1 Lea, 500; *Gage v. Railway Co.*, 88 Tenn., 726; *McBee v. Bowman*, 89 Tenn., 133; *Stone v. Manning*, 103 Tenn., 232; *Jackson v. Blanton*, 2 Bax., 63; *Dunlap v. Haynes*, 4 Heis., 476.

3. LIFE INSURANCE. *Insurer precluded by the fraud of its medical examiner.*

An insurance company cannot avoid its policy for incorrect answers touching the assured's physical condition, and personal and family history written into the medical examination upon which the policy is based, by the insurer's medical examiner, without the knowledge or consent of the assured, who had, in fact, answered all questions correctly. (*Post*, pp. 375-376.)

4. SAME. *Authority of medical examiner defined.*

While the medical examiner of an insurance company is an agent with limited powers, nevertheless his acts in and about the

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business intrusted to his care are binding within the scope of his authority, and to this extent the general rules of agency are applicable to him as to other special agents. *Post*, pp. 376-377.)

Case cited: *K. of P. v. Cogbill*, 99 Tenn., 34.

5. SAME. *Rescission of policy.*

Although the insurer may be estopped to rely upon incorrect answers inserted in the application by the medical examiner without assured's knowledge or authority to avoid its policy, this fact does not estop the assured, upon the discovery of such defect, to sue for rescission of policy and recovery of premiums paid thereon. (*Post*, pp. 377, 378.)

6. SAME. *Same.*

And such suit is not barred by the defendant's failure to read his policy, or the application for it, in which the defect was disclosed, for over two years after its issuance. (*Post*, pp. 378-380.)

7. SAME. *Same.*

Nor is such suit defeated by the assured's delay to bring it for two months after discovery of the defect in his policy. (*Post*, pp. 378-380.)

FROM GIBSON.

Appeal from Chancery Court of Gibson County.
JOHN S. COOPER, Ch.

DEASON & RANKIN for Bennett.

C. D. BERRY and SPL. HILL for Mass. Mutual Life Ins. Co.

WILKES, J. This is a bill to recover back premiums which were paid by complainants upon a life

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insurance policy in the defendant company. These premiums are sought to be recovered upon the ground that, while the assured made true answers to all questions asked him by the medical examiner of the company touching his physical condition and family and personal history, they were not by the examiner written down as directed by the assured, but false and incorrect answers were written down by the examiner, without the knowledge or assent of the assured; and that complainant, the assured, did not know that such false answers had been written down until after two payments of premiums had been made, and the third was about due.

The company denied that any such false answers had been written down, but insisted that if mistaken in this, still it would have been estopped by the act of the examiner from relying thereon and would have been bound by the policy, even though the answers were falsely written; that the policy would have been incontestable with the next payment, in any event, so that the complainants had all the while been insured under the policy, and were not injured or likely to be from the incorrect answers.

Proof was taken and the Chancellor held that complainants were entitled to the relief sought, and defendant has appealed and assigned errors.

It is said that the evidence does not justify the decree for the reason that the answers in the written application, signed by the assured, could not be

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contradicted and overturned by the evidence of the assured alone.

We treat this assignment as raising both the question of competency and sufficiency of the assured's testimony. It was objected to in the Court below as incompetent, and the objection was overruled by the Chancellor. If the suit in this case was upon the contract, and in affirmance of the same, the testimony might be properly rejected upon the theory that it seeks to vary the terms of a written contract. But the action in this case is to rescind the contract because it was fraudulently written, and did not state the answers as they were given, nor express the real contract and intention of the parties. In such case parol proof is competent to establish the fraud and admissible to show that the contract as written is not the contract as made by the parties. Bacon on Benefit Societies, Sec. 153; *McKenzie v. Planters Ins. Co.*, 9 Heis., 261; *Barnard v. Roane Iron Works*, 85 Tenn., 139.

As to the sufficiency of the proof, it appears that the facts material to be shown are deposed to by only a single witness, the assured himself, and his testimony is directly in conflict with the statements made in the application. As to the latter feature, under the aspect in which the matter is presented, it is not an objection to the testimony that it contradicts the written application. Indeed, this is the gist of the whole controversy, to wit, that the answers made in the application are not true, and

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are not as made by the assured, but were fraudulently made by the examiner. The principle invoked might apply with great force if the answers had been made by the assured and he afterwards, upon his examination, sought to contradict them.

We know of no rule requiring any number of witnesses to prove a fact such as is set out in this case. It is true the burden is upon the party seeking to impeach the writing, but a preponderance of evidence is all that is required in this, as well as other civil actions. *Chapman v. McAdams*, 1 Lea, 500; *Gage v. Railway Co.*, 88 Tenn., 726; *McBee v. Bowman*, 89 Tenn., 133; *Stone v. Manning*, 103 Tenn., 232; *Gibson's Suits in Chancery*, Sec. 446.

It appears that there is no testimony whatever to contradict that of complainants. The soliciting agent of the company, as well as the medical examiner, were present when the answers were given, and neither one was examined, and this raises a presumption that they would not have contradicted the statement of the complainant. The case is, in effect, a charge of fraud as against them, and this amounted to a challenge to them to testify. *Jackson v. Blanton*, 2 Bax., 63; *Dunlap v. Haynes*, 4 Heis., 476. In the absence of any testimony from them contradicting the statement of the assured, we think the Chancellor was warranted in finding the facts as stated by the complainants.

It is said that the Chancellor erroneously held

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the policy void because of the fraud of the medical examiner. It is contended by the complainants, and was held by the Chancellor, that the medical examiner was a special agent, and that he exceeded his authority in writing down answers contrary to direction, and, hence, the company was not bound thereby; so that, as a matter of law and fact, the complainants had no protection, and the payment of the premiums was without consideration. On the other hand, the company insists that it could not have successfully defended against the policy, because of the fraudulent conduct of its own medical examiner, so that complainant could have enforced the contract, and the policy, in the event of death, would have been collectable.

We are of opinion that the company, in the event of a loss, could not have defended against the policy, if all the facts could have been developed, as shown in this record. It is true the medical examiner of the company is not a general agent of the company, in the broad sense of the term, but one whose duties are confined to a single feature or department of the business, but in that department he is a general agent. The doctrine is thus stated by Mr. Joyce in his work on insurance, Vol. 1, Sec. 412: "A medical examiner is an agent with limited powers, but, nevertheless, his acts in and about the business entrusted to his care are binding within the scope of his authority, and, to this extent, the general rules of agency are applicable to

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him as to other special agents." See, also, the case of *Knights of Pythias v. Cogbill*, 99 Tenn., 34; 2 Enc. of Law, 328; *Gratton v. Metropolitan Life Ins. Co.*, 80 N. Y., 281 (S. C., 36 Am. Rep., 617). We think the company would have been bound, under the facts of this case as they are now developed, in the event of death before the contract was repudiated by the complainant, and he was, until then, insured. The company, under the facts stated in this record, could not have defended upon the ground that the answers were not true, if it, at the same time, appeared that the examiner had written down unauthorized and untrue answers. *Pud-
iyyky v. Imp. Lodge*, 76 Mich., 428 (S. C., 43 N. W. Rep., 373); *Ass. Soc. v. Renthinger*, 25 S. W. Rep., 835; *Insurance Co. v. Boodis*, 52 Ark., 11; *Flynn v. Insurance Co.*, 78 N. Y., 568; *Gratton v. Insurance Co.*, 80 N. Y., 281; *Insurance Co. v. Momudy*, 89 Pa. St., 363; *N. Y. Life Ins. Co. v. Russell*, 23 C. C. A. Rep., 54; *Mass. Life Ins. Co. v. Eshelman*, 30 Ohio St., 647; *Union Mutual Life Ins. Co. v. Wilkenson*, 13 Wall., 222; *New Jersey Mutual Life Ins. Co. v. Baker*, 94 U. S., 610; *Clemmons v. Imp. Soc.*, 16 L. R. A., 1 to 36.

But, while it is true that, upon the facts being fully developed, the company could not have defended against this policy, it is evident the assured was put to a great disadvantage, and possibly it would have been impracticable to develop the facts after the death of the assured. We will suppose

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the company to have been sued upon the policy after the death of the assured. It is apparent from the record in this case that it could have been readily shown that false statements were made in the application, and this, without more, would have avoided the policy. In order, then, to recover upon it, complainants must have shown the fraud and virtually reformed the application. But this could only be done by the assured himself, and, he being dead, the application could not have been reformed, and the company would have escaped liability. We are of opinion, therefore, that complainant was not efficiently protected by this policy, and, upon discovering the fraud, he was warranted in repudiating the contract and treating it as though it had never been made.

It is next insisted that complainant has been guilty of such laches as must estop him from now insisting upon any relief. Complainant testifies that he had great confidence in the medical examiner, and did not read over the answers after they were written, and he did not know of the fraud practiced upon him until just before the third payment fell due; that he then immediately wrote to the company, calling attention to it, and also called the attention of Dr. Hunt, the medical examiner, to the matter, and inquired of him how it occurred, and, when put in possession of the facts, brought suit within two months thereafter.

We think that the suit was brought with sufficient

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promptness after the facts were discovered, and the principal difficulty is in the fact that the complainant did not examine the written answers at the time they were made and not within two years or more thereafter, although a copy of them was in his possession during that time. Reposing confidence in the examiner, and assuming that he wrote the answers correctly, the complainant neither read the medical examination when it was made, nor until two years or more thereafter, when he became aware of the fraud and thereupon sought to avoid it. While it was an act of negligence in complainant not to have examined the writing, it was negligence superinduced by the confidence which he reposed in the medical examiner, and this enabled the company to practice the fraud upon the assured.

We think that, whatever might be the rights of third persons growing out of this matter, it does not lie in the mouth of the company, upon the one hand, to confess its fraud, and on the other, to say that you are estopped to rely upon that fraud because you have not more promptly discovered it. As a matter of common observation, even good business men do not examine the various conditions and statements in their policies as they should, but we think that when the fraud is virtually confessed, and from the very nature of the case must have been premeditated and designed, it would be going too far to hold that because the assured was lulled and misled by his confidence in the agent of the

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insurance company that the company can take advantage of this to make its own fraud effective.

In this connection it is proper to state that it appears that complainant was debating the propriety of taking the cash value of his policy and surrendering it when he discovered the fraud, and the fraud was discovered in consequence of the examination he was making in order to determine this question. It is also proper to state that, with the next payment of premium, the policy of complainant would have become incontestable for this fraud of the medical examiner, so that complainant, if he had desired, could have continued his policy in full force by making the payment. The record, as we think, discloses the fact that he did not desire to continue the policy, as the premiums were burdensome, and he seized upon the fraud of the examiner as a reason for putting an end to the contract and recovering the premiums he had paid, instead of taking the alternative of cashing the policy for its value.

While this is the situation, and no doubt this was the motive that prompted the assured, still it would not authorize this Court to impose upon him a contract which he has not made and which, by the fraud of the company's agent, was based upon false premises, and he had the right to repudiate it, and recover back the money paid upon it.

We are of opinion the Chancellor reached the correct result and equity of the case, and his decree is affirmed with costs.

Judges McAlister and Beard do not concur.

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*(Jackson. June 19, 1901.)*1. EVIDENCE. *Verdict of coroner's jury not admissible, when.*

The verdict of a coroner's jury finding that defendant killed the deceased, and that the killing was a "cold-blooded murder," is not admissible against the defendant in a murder trial. *Aliter*, it seems, in civil cases, as to that part of the verdict which is not a mere expression of opinion. (*Post*, pp. 382-385.)

Case cited: *Galloway v. Shelby County*, 7 Lea, 121.

2. SAME. *Withdrawn, no cause for new trial.*

If incompetent evidence that has gone before the jury is afterwards definitely withdrawn with proper instructions to the jury to disregard it, it constitutes no cause for new trial or reversal. (*Post*, pp. 385, 386.)

Cases cited: *Railroad v. Humphreys*, 12 Lea, 200; *Green v. State*, 97 Tenn., 59-62.

3. SAME. *Self-serving declarations.*

Statements of the defendant made on the day before the killing explaining his relations with deceased and narrating his action are not part of the *res gestæ*, but self-serving and inadmissible on a trial for the murder. (*Post*, pp. 386, 387.)

Cases cited: *Evans v. Jones*, 8 Yer., 463; *Kirby v. State*, 7 Yer., 259; *Kirby v. State*, 9 Yer., 383; *Irvine v. State*, 104 Tenn., 138.

4. SAME. *Exclusion of acts not traced to deceased.*

The court does not err in excluding on a murder trial proof of acts of an unknown person calculated to put the defendant in fear, when they are in no way traceable to the deceased. (*Post*, pp. 387, 388.)

5. SAME. *Witness' opinion incompetent.*

It is reversible error for the Court to permit a witness, over defendant's objection, to testify in a murder trial that he had

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said, on some occasion when defendant was not present, that he "would not kill a dog like he, defendant, killed that man." (*Post*, pp. 388-390.)

6. SAME. *Same*.

And this ruling is not relieved of its erroneous character by the fact that the witness made said statement, detailing his former expression of opinion in answer to a question asked by the State on re-examination calling for the remainder of a conversation inquired about on cross-examination, but not in relation to this particular matter. (*Post*, pp. 388-390.)

Case cited: *Greer v. State*, 6 Bax., 629.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby County. L. P. COOPER, J.

HANCOCK & POSTON and JOHN T. MOSS for Colquit.

Attorney-general PICKLE for State.

MCALISTER, J. Colquit was convicted of murder in the second degree for killing one Fred. Hunt, colored, and sentenced to the penitentiary for twenty years. He has appealed in error.

The first assignment is that the Court erred in permitting the State to introduce in evidence the verdict of the Coroner's jury on the inquisition of this homicide. The verdict was that Colquit killed Hunt, and "said killing was, in our opinion, a cold-blooded murder." Counsel for the prisoner excepted

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at the time to the evidence, but the Court overruled the objection and permitted the verdict of the Coroner's jury to be read. On the following morning, however, the Court, of its own motion, withdrew this evidence, and instructed the jury to give it no consideration.

The question of the admissibility of such evidence has never been decided by this Court, so far as we are informed, and yet it frequently arises in the lower Courts. We have found, in our examination of the question, precedents for its introduction in civil cases, but no criminal case in which it was admitted. The case of *United States Life Insurance Co. v. Killgast*, 6 Law. Rep. Annotated, 65, was an action on a policy of life insurance. The defendant company relied on a clause of the policy which provided that if, within three years from the date of the policy, the insured should die by any act of self-destruction whatever, the policy should become null and void. It was shown that the insured died by an act of self-destruction—to wit, by shooting himself with a pistol. On the trial, the defendant company offered in evidence a certified copy of the Coroner's inquest, which showed on its face that the insured came to his death by a pistol shot, fired by the hand of deceased, while laboring under a fit of temporary insanity. The Court below excluded this evidence. The Supreme Court of Illinois held, on appeal, viz.: "We are satisfied, both upon principle and authority, that the Coroner's in-

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quisition was admissible.” The inquisition was made by a public officer, acting under the sanction of an official oath, in discharge of a public duty enjoined upon him by the law, and, when it is returned into court and filed, we see no reason why it should not be competent evidence, tending to prove any matter properly before the Coroner which appears upon the face of the inquisition. We do not hold that such evidence is conclusive, but only that it is competent evidence to be considered.”

The Court cited 1 Greenleaf on Evidence, Sec. 556; 2 Phill. on Ev. (5th Am. Ed.), 262; 2 Taylor on Ev. (6th Ed.), Sec. 1437; Starkie on Ev., 1309. In the latter authority it is stated that in *Sergesol v. Sealy*, 2 Atk., 412, Lord Hardwick said that inquisitions of lunacy and inquisitions *post mortem* were always admissible, though not conclusive. In the case of *Burridge v. Earl of Sussex*, 2 Ld. Raym, 1292, an inquisition *post mortem*, setting out the tenor of a deed, was held to be evidence of the deed. But no case has been cited, nor have we been able, in our examinations of this question, to find a case where such evidence was held admissible in a criminal case. It was held in *State v. Cecil Co.*, 54 Md., 426, presumably a criminal case, that the inquisition of a coroner's jury is inadmissible to prove that County Commissioners were negligent in not providing a “safe and suitable crossing over a creek while they were repairing a bridge over same.”

It was said by this Court, in *Galloway v. Shelby*

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County, 7 Lea, 121, "the Coroner's inquest is no part of a criminal prosecution, although it may uncover facts which may lead to one, but it is, as its terms import, an inquiry to ascertain the causes and circumstances attending the death," etc.

It is not a part of the prosecution, and we do not see upon what ground it is admissible. Such an inquisition is generally conducted in the absence of the accused, with no opportunity to offer testimony or cross-examine witnesses, and is a proceeding wholly *ex parte*. The verdict of the Coroner's jury in this case that "this was a cold-blooded murder," was the expression of an opinion touching the very issue submitted to the determination of the jury, and such evidence was manifestly incompetent.

But, as facetiously remarked by an eminent member of the bar, the prisoner has no vested rights in the mistakes of the trial Judge, and, if the illegal evidence is withdrawn and the jury admonished to give it no consideration, the trial Court has done all that is practicable to correct the error. In this case the trial Judge, after having become satisfied that the evidence was incompetent and illegal, withdrew it from the jury and instructed them not to consider it. He repeated that admonition in his charge, and the jury thoroughly understood that the Coroner's inquest was not before them. It has been repeatedly held by this Court that, if incompetent proof go to the jury, and the Court afterwards definitely withdraw it, with proper instructions, it is

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no cause for reversal. *Railroad v. Humphreys*, 12 Lea, 200; *Green v. State*, 97 Tenn., 59-62.

The second assignment is that the Court erred in refusing to admit the declarations of the prisoner made prior to the homicide. The defendant offered to prove that, the day before the shooting, he went to the witness and stated that he had had trouble with the deceased, and that deceased had threatened him, and defendant asked witness' advice. Witness advised him "not to carry a pistol or anything of that sort, but, if defendant thought it was necessary to carry one, to go down to the Chief of Police and get permission to carry one." Defendant offered, in this connection, to prove that, on the next day succeeding the conversation just stated, and on the same day of the homicide, defendant went to the police station and called for the Chief of Police, but the latter was absent. Defendant stated to witness that a man had been hanging around his house and making threats. Witness said to him that a man had a right to defend his own house. The Court excluded the statements, upon the ground that they were self-serving declarations and were not part of the *res gestæ*.

We think the action of the Court was correct. "When the nature of a particular act is questioned, a contemporary declaration by the party who does the act is evidence to explain it." 1 Starkie on Ev., 48. This principle was illustrated in *Evans v. Jones*, 8 Yer., 463, where the question for the jury to decide

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was whether Jones, by abandonment of his reservation, had forfeited his right to it. In order that his removal should have that effect, it must have been voluntary. His declarations at the time that a certain person came and threatened him are admissible. *Kirby v. State*, 7 Yer., 259; *Kirby v. State*, 9 Yer., 383. See authorities in 2 Webb & Meigs' Digest, 1610. But, in the present case, the act of the defendant in going to the witness, Sellers, and to the police station, and his declarations made at the time, are not called into question or involved in this case. There is no litigated act to be explained nor motive to be ascribed to conduct. These declarations are not part of the *res gestæ*, but merely self-serving. 2 Wharton on Evidence, Secs. 1100, 1101. In *Irvine v. State*, 20 Pickle, 138, this Court said: "The rule seems to be well established that, wherever the act of a party is in issue and may be put in evidence, what he said at the time of doing the act, calculated to explain it or make that clear which otherwise might be doubtful, is equally competent; but the declaration must be so connected with the act as to make the two constitute one and the same transaction. When this concurrence takes place, then the declaration is but the articulate voice of the act."

The third assignment is that the Court erred in excluding proof offered by defendant to the effect that shortly before the homicide, on two different occasions, a man came to defendant's house about or

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after midnight, aroused the people therein, and asked to see Colquitt; refusing to tell his name or what he wanted with him, but said he wanted to whisper something in his ear alone. The Court very properly ruled that, unless deceased could in some way be connected with these nocturnal visits, the evidence was inadmissible.

The fourth assignment is the Court erred in admitting, over defendant's objections, statement of witness Hollister that he told Divine that he, Hollister, "would not kill a dog like, he, defendant, killed that man."

It is stated that the Court permitted this statement of the witness, on his re-examination, to go to the jury, on the ground that defendant's attorney had asked the witness, on cross-examination, as to his conversation with Divine. The only question asked witness, by defendant's attorney in regard to his conversation with Divine, was if he did not state to Divine that only one man was on the sidewalk at the time the shooting began. The witness replied, "I do not remember telling him there was only one. I know I saw two." This was all that was asked by defendant's counsel and the whole of the witness's reply on that subject. The question was asked on cross-examination. The Attorney-general had asked the witness, on his original examination, if he was sure there were two men together when defendant fired his first shot, and the witness stated, "Yes, I am sure of that." Now, on cross-exami-

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nation, defendant's counsel asked the witness this question, viz.: "Didn't you tell Mr. Divine at Mr. Leslie's house about a week before the last setting of this case for trial, that there was only one person on the sidewalk when the shooting began?" The witness replied, as already stated, "I do not remember telling him there was only one man; I know there were two."

On redirect examination the Attorney-general stated to witness, "They asked you about a conversation with Mr. Divine; where was that conversation?" Witness replied, at 228 Vance street. The witness then proceeded to state the details of the conversation, and concluded by stating that he told Mr. Divine, "I would not kill a dog like defendant killed that man" (deceased). Defendant's counsel objected to the statement of the witness. The Court remarked, "You asked about the conversation. You can't take out the part that suits you, and reject the other part." Defendant's counsel insisted that the opinion of the witness was not responsive to any question asked by him. The Court replied, "The whole conversation is responsive to it. You cannot take a part of it and reject the other."

We think this evidence was highly prejudicial to the defendant, and incompetent. It was the expression of an opinion of an eye-witness to the killing, of its cruelty and atrocity. No conversation had been called for by defendant's counsel on cross-examination. Counsel simply asked the witness if he

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had not stated to Divine, on a certain occasion, that only one man was on the sidewalk when the shooting began. The State was, of course, entitled to all that was said on that subject, but not to an opinion expressed by the witness as to the cruelty of the killing. In *Greer v. State*, 6 Baxter, 629, it appeared that counsel for defendant asked a witness if he had made a certain statement to A, to wit: "that he only wanted to get one swear at defendant, and he would hang him," etc. The witness denied that he had made the statement. In re-examination, the Attorney-general asked the witness to state all he said to A in that connection, which was objected to by defendant. The objection was overruled by the Court, and the witness was permitted to give the details of a quarrel between himself and defendant, in which the defendant cursed him and used very abusive and insulting language towards him. The Court said this was a misapplication of a very familiar rule of evidence, that, when one party brings out a part of a conversation, the other is entitled, by way of explanation, and as a matter of right, to all that was said in that conversation, though otherwise it might have been incompetent in that form. "Here," said the Court, "the defendant did not, by his question, bring out a part of a conversation by way of proving facts favorable to his side of the case, but only asked if the witness made a certain statement, which he positively denied. This gave the other

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party clearly no right to introduce an entire conversation, that might injuriously affect the defendant, about a matter not in any way connected with the case under interrogation and shedding no light whatever on it.”

We think that case applicable in the present instance, and that the opinion of the witness was incompetent, nor admissible under the claim that defendant's counsel had called for a conversation.

For these reasons, the judgment is reversed and the cause remanded for a new trial.

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STREET RAILROAD AND TEL. COMPANIES v. SIMMONS.

(*Jackson.* June 22, 1901.)

1. NEW TRIAL. *Extension of term of Court for disposition of.*

The authority conferred by Acts 1899, Ch. 40, upon the Courts of this State to continue and extend any of their terms beyond the time limit fixed by law, and into another and succeeding term at the same or another place for the purpose "of trying, disposing of, and returning verdict and rendering judgment" in cases "pending and on trial by Court or jury undetermined" at the expiration of the term, confers upon the Courts the power to continue and extend their terms for the purpose of disposing of motions for new trial and granting appeals. (*Post*, pp. 393-396.)

Act construed: Acts 1899, Ch. 40.

Code construed: § 6057 (S.); § 4991 (M. & V.); § 4219 (T. & S.).

Case cited and distinguished: *State v. Sneed*, 105 Tenn., 714.

2. SAME. *Misconduct of jury.*

A verdict is vitiated by statements made to the jury by one of their number during their deliberations out of the presence of the Court, which were of a character to prejudice the complaining party, although the jurors testify they were not influenced by same. And such statements may be proved by affidavits of the jurors. (*Post*, pp. 401-403.)

Cases cited: *Donston v. State*, 6 Hum., 275; *Wade v. Ordway*, 1 Bax., 240; *Morton v. State*, 1 Lea, 498; *Nolan v. State*, 2 Head, 521; *Sam v. State*, 1 Swan, 61.

3. MASTER AND SERVANT. *Servant's diligence to protect himself.*

The servant of a telephone company, commonly called a lineman, whose duties, *inter alia*, are to put up poles, string wires, put in guy wires, and to repair same and clear the lines of troubles, must inspect and test the wires which he is expected to work; and being engaged in an occupation peculiarly hazardous, and having the better opportunity to discover and avoid the dangers incident thereto, he cannot, without negligence,

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assume that wires are properly and safely insulated, but must exercise active diligence to discover defects that may possibly exist. (*Post*, pp. 397-408.)

Case cited: Cumberland Tel. Co. v. Loomis. 87 Tenn., 504.

FROM MADISON.

Appeal in error from Circuit Court of Madison County. R. W. HAYNES, Special Judge.

C. G. BOND and HAYS & BIGGS for telephone and street railroad companies.

R. F. SPRAGINS and BULLOCK & TIMBERLAKE for Simmons.

MCALISTER, J. Mrs. Simmons recovered a joint judgment against the telephone and street railroad companies, for the sum of \$2,500, for the wrongful killing of her husband, R. P. Simmons. Both companies appealed, and numerous errors are assigned.

A preliminary motion is interposed in behalf of the defendant in error to dismiss the appeal, upon the ground that it was granted after the expiration of the term—that is to say, after the term had expired, by law. The record shows that the Circuit Court of Chester County begins its fall term on the third Monday in October, and that, in 1900, it should have convened, by law, on October 15. The

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motion for a new trial in the present case was made in the Madison Circuit Court on October 12, and, there not being sufficient time to dispose of the motion, it was held under advisement until Tuesday, October 16, when the motion was overruled, the appeal prayed and granted, and thirty days allowed to file bill of exceptions. The bill of exceptions was signed October 31, which was within the thirty days allowed by the Court. As already stated, the Chester Circuit Court began, by law, October 15, and the appeal in this case was granted October 16. The insistence now made is that the Circuit Judge had no power or authority to grant the appeal after the expiration of the term. It is agreed that said action of the Court was had three days after the time fixed by law for the adjournment of said Court, and the second day of the term prescribed by law for Chester County. Counsel cites, in support of this position, the case of *State v. Sneed*, 21 Pickle, 714, in which it appeared that the term of Court in Knox County closed on September 1, and on September 3, when the entries were made, praying and granting an appeal, and giving time to prepare bill of exceptions, the Court was, by law, in Sevierville, Sevier County, and could not be open in Knoxville. This Court held that the action of the Court on September 3 was void and of no effect, and the entry ordered on that day to be made, as of date September 1, was unauthorized and of no effect, etc. In that case, how-

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ever, it appeared that, while the judgment was pronounced during the trial term, it was held up, by order of the Court, and no entry thereof was made until after the time for the adjournment of the Knox County Circuit Court and the convening of the Sevier County Circuit Court, when the trial Judge caused an entry of the judgment to be made, *nunc pro tunc*, as of September 1. This entry recited, however, that the prayer for an appeal was not made and granted until September 3. The record thus showed that a judgment was entered September 1, when Court was in session, but no appeal was prayed or granted until September 3, when the Court was not, and could not be, in session. There was no motion for a new trial.

In the present case the motion for new trial was entered on Friday, October 12, partially considered and continued over until Saturday, October 13, and there not being sufficient time to finish it on that day, it was held under advisement until Monday, October 15. On that day it was still unfinished and went over until next day, the 16th, when it was overruled, the appeal prayed and granted. It appears that, during the time the motion for a new trial was pending, the jurors were being examined touching certain charges of misconduct. The Acts of 1899, Sec. 6057, Shannon's Code, provides, viz.: "That whenever, in the Courts of this State, any case is pending, and on trial by court or jury, undetermined at the time, the term at which it is

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pending expires on account of time and on account of the arrival of the succeeding term, the term shall be extended and continued into such succeeding term for all the purposes of trying, disposing of and returning verdict and rendering judgment in such case so pending and on trial, the same as if such new term had not arrived." Acts 1899, Ch. 40, p. 35.

We think the motion for a new trial is within the purpose and intendment of this statute, and that so long as the motion for a new trial is being considered by the Court, the case is not disposed of within the meaning of the act. If this construction is not correct, then the statute involves the absurdity of permitting an infringement upon the succeeding term to the extent of finishing a pending trial, but shutting off the motion for a new trial or the right of appeal. This, of course, the Legislature could not do, and if the term is extended for the purpose of finishing the trial, it must be further extended for the disposition of the motion for a new trial and the prayer for appeal. All this, we think, is comprehended within the language "disposing of the case," employed in the statute.

The case of *State v. Sneed* is not controlling here, for the reason there was no motion for a new trial pending, or any record entry of any matter which was being considered by the Court touching a pending case. The motion to dismiss the appeal is, therefore, overruled.

The gravamen of the action, as laid in the dec-

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laration, is that plaintiff's intestate, R. P. Simmons, at the time of his death, was in the employment of the telephone company, in the capacity of a lineman, and was killed by coming in contact with a live wire of the street car company attached to one of its poles which Simmons had ascended for the purpose of making repairs for the telephone company. It is alleged that, prior to that time, the street car company and the telephone company had entered into a contract, parol or written, by which it was mutually agreed that either company might use the poles of the other in case of necessity or expediency. Again, it is alleged that the street railroad company, by permitting the telephone company to string its wires on the poles in question, made the latter company a licensee, whereby the street railroad company owed a duty to the telephone company and its employees to keep its wires attached to said poles properly insulated. Again, it is alleged that the street railroad company, in carrying on its business and maintaining its system of wires in a public thoroughfare where the poles and wires of other electrical companies were maintained, owed a duty to the employees of the other electrical companies, to keep its wires attached to said poles safely insulated. It is further charged that the defendant telephone company, by stringing one of its wires to said pole, for the purpose of making a return circuit, made said pole part of its appliances and premises, and defendant telephone

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company, in not providing safe appliances, and inviting deceased to an unsafe and dangerous place to work, is liable. It is further charged that both companies knew, or ought to have known, that said wire was not insulated and that it was charged with a deadly current of electricity. The facts disclosed in the record tend to show that the deceased, at the time of the accident, was in the service of the telephone company, as lineman and inspector. His duties were of a general nature—that is to say, they were not specifically defined—but the deceased was expected to perform any duties in the line of telephone business that might be demanded of him.

On September 17, 1897, a street car had become derailed, and the trolley pole, in some way, came in contact with the guy wire attached to a pole of the car company, thereby turning the current of electricity from the trolley wire to the guy wire, and, pushing the guy wire up, caused it to come in contact with the lead cable incasing the telephone wires, and burning a hole in the cable. When the derailed car was placed back on the track, the original *status quo* was restored, and there was no further communication between the trolley and guy wires. The telephone company was apprised of the accident, and directed the deceased to proceed to the place and ascertain the cause of the trouble. The deceased, after an examination of the premises, and without especial directions from his superior officers, mounted a pole belonging to the street car

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company, ostensibly to raise the lead cable of the telephone company, which was then sagging down, and attach to it a bracket affixed to the street car pole, and, while thus engaged, Simmons was killed by coming in contact with one of the live spur wires of the street car company. The gravamen of the action against the street car company is that it was negligent in only using a single insulator, placed at the connection of the span wire with the trolley wire, and which insulator was itself defective and out of repair, and negligently failing to place a second insulator at some proper and convenient point between the trolley wire and said pole.

There is proof tending to show that no inspection had been made by the street car company, from the time it began operating—April 30, 1897—up to the time of the accident, to see if its said insulator was in good condition. It was insisted that the street car company had at its powerhouse what is termed a current breaker, and that no other test or inspection of insulators was necessary. It is further shown that the street car system had only been in operation in Jackson for about four months; that it was equipped with the best and most modern appliances; that the span wires were attached to the trolley wire by the bell-hanger insulator, which was the latest and most effective appliance for preventing the electrical current from escaping from the trolley wire to the span wire. It is also shown that the company had furnished Simmons with a magneto bell

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and test set, in order to enable him to ascertain the presence of an electrical current in any wire, but that he failed to have it with him on this occasion. Whether these instruments were useful only in discovering electrical disturbances on the line, and were not designed to test the insulators and defects therein, or their location, was a question addressed to the superior wisdom of the jury. It is said, however, that a common and very reliable test of the voltage of the wire is to brush it lightly with the hand or with an old piece of iron, and that this test was usually applied by linemen. There is evidence tending to show that, when Simmons first mounted the pole, he touched the wire that afterwards caused his death, but at that time no serious result was experienced. It is said that a defective insulator acts perfectly at one moment, and the next moment will permit a fatal current of electricity to pass over the wire. It is insisted, on behalf of defendant in error, that the deceased did not know, until he received the shock, that the wire which produced his death was dangerous. On the other hand, there is proof tending to show that, about thirty days prior to the accident, the deceased was engaged, with others, in running a wire of the telephone company along by said pole where deceased was killed, and he received a shock at that time from one of the wires attached to that pole. It is also in evidence that, on the day of the accident, deceased stated that the wires were hot, and

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he was warned, by one or two others, not to ascend the pole. This is a substantial statement of the case, as made in the pleadings and proof.

The thirteenth assignment of error is based upon the misconduct of the jury, in communicating to each other matters which were not presented in evidence. On the motion for a new trial, it was shown that, after the jury retired and were engaged in their deliberations, a juror stated to his fellow-jurors that the telephone company had, as a compromise of the case, offered to give Mrs. Simmons employment for twenty years at \$45 per month. It was also stated in the jury room that, on the former mistrial of the case, ten of the jurors favored awarding the plaintiff \$8,000 damages; one, \$1,500, and another was against any amount. It is insisted, however, that these statements were innocuous and did not influence the jury in assessing the damages on this trial. On the motion for a new trial in the Court below, the jurors were examined touching this subject, and the substance of their evidence was that, when the jury retired to consider their verdict, a ballot was immediately taken, and all voted in favor of allowing the plaintiff damages against both defendants. The entire jury, excepting one man, favored damages exceeding \$2,500, the final verdict. The one juror favored a verdict for only \$500. The jurors testified that these extraneous statements did not, in any manner, influence their verdict, but the fact remains that, while one

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of these jurors only favored \$500 on the first ballot, he finally agreed to a verdict of \$2,500. This juror stated that the extraneous statement as to how the former jury stood, on the mistrial of the case, was made for his benefit and in order to induce him to raise his figures, but he claimed that, as a matter of fact, it had no influence whatever on his action.

It has always been held in this State that testimony given to a jury after it has left the presence of the Court vitiates a verdict, because it is not on oath and is given without the knowledge of those to be affected by it, and who have, therefore, no opportunity of meeting and repelling it, and that testimony was so given may be shown by the affidavits of the jurors. *Donston v. State*, 6 Hum., 275; *Wade v. Ordway*, 1 Bax., 240 (S. C., 1 Leg. Rep., 159); 1 Shannon's Cases, 265; *Morton v. State*, 1 Lea, 498; *Nolan v. State*, 2 Head, 521. In the case of *Sam v. State*, 1 Swan, 61, the juror stated that the information communicated to him by his fellow-jurors exercised no influence whatever upon him in making up the verdict, and that he thought or believed they would have come to the same conclusion from the testimony in the case. Judge McKinney, however, said it was not for this Court to say whether the testimony was sufficient to have supported the verdict, independent of the statement made to the jury.

In answer to the idea that the Judge might say

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that there was sufficient evidence adduced at the trial to justify the finding of the jury, and that the evidence improperly given to them could have had no influence upon the verdict, that this was purely a matter of fact and not in the province of the Court to determine. It is impossible he should be able to do so, because the law had no criterion by which to know or ascertain the effect which the admission of improper evidence may produce on the verdict of the jury. The effect might be different, and of necessity would be so on different minds, according to the mental and moral qualities of the individuals composing the jury—their intelligence, power of discrimination, and a thousand other considerations—and, therefore, the law excludes all irrelevant and illegal evidence. He goes on, then, to remark upon the statement of the juror that he was not influenced, treating this as not of any weight, and concluded with the rule that, when improper evidence is allowed to go to the jury, it is enough that the case may have been prejudiced thereby, and the law will so presume. The Court said the rule in criminal and civil cases is the same. *Ordway v. Wade*, 1 Baxter, 340.

The third assignment of error is that the Court instructed the jury that, “If Simmons (the deceased) had no knowledge, either actual or by information, that the span wires of the street railroad company, at the point in controversy and strung to this pole, were not properly insulated and reasonably safe, then

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he had a right to presume they were properly and safely insulated, unless the want of insulation at all, or defective insulation, was so open and obvious that he ought, in the exercise of ordinary and reasonable care and caution, to have so known."

This charge we think erroneous, for it relieves the employe of the duty to exercise active diligence for his own safety in an occupation peculiarly hazardous, and where the employe has the better opportunity of discovering and avoiding the danger. In the case of the *Cumberland Telephone Co. v. Loomis*, 3 Pickle, 504, it was held by this Court, viz: "A charge to the effect that a servant may assume that a telephone pole, which he is required to climb in the due course of his employment, is safe and suitable for that purpose, is erroneous in a suit brought by the servant for injuries caused by the breaking of the pole, in that it relieves him from the exercise of ordinary care for his own safety and decides that he was not the company's inspector of poles—a disputed fact in the case." In the case at bar the proof shows that it was the duty of Simmons, as a lineman, to dig holes, raise poles, put cross-arms thereon and steps, string wires, put on guy wires, and clear line troubles. And, as an inspector, his duties were the foregoing, together with clearing trouble in instruments, putting in new telephones, collecting, when needed, and making himself generally useful. The record further shows that Simmons was an experienced man in his line of

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business; that he had been manager of the telephone company at Humboldt, and employed in the service at Nashville, where intricate systems of telephone and electric car wires cross each other and are maintained. It was necessarily a part of his duty to inspect and test the wires about which he expected to work.

The case of *Anderson v. Inland Telephone & Telegraph Co.*, 41 L. R. A., 410, was a case where a servant of the telephone company brought an action against the telephone company and the street railway company, jointly, for personal injuries. At the time of the accident the plaintiff was a lineman in the employ of the telephone company. The two defendants used in common a pole—the telephone company for holding up its wires, and the street railroad company fastening to said pole a span wire or guy wire running from the trolley wire. The plaintiff, a lineman, ascended said pole for the purpose of stringing a wire on it, and, while on the pole, came in contact with the span wire belonging to the street railway company, and sustained from the shock serious personal injuries. It was held that the failure of the lineman to test the insulators would preclude any recovery.

Bergen v. Southern Telephone Co., 70 Conn., 54 (S. C., 39 L. R. A., 192), was a case where a telephone company and an electric railroad company used the same pole for their wires, and the Court held that the law did not absolutely require the

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telephone company, as between it and its linemen, to test and inspect guy wires and circuit breakers, put in by such railroad company, to discover whether they were in a safe condition, but whether the employer or employe should discharge such duty, depended on the facts of the particular case. "Linemen," said the Court, "are employed by the telephone company, among other things, for the purpose of doing work which is dangerous, by reason of the possible contact of the telephone wires with highly charged wires of the street railway or other companies. The linemen are to do their own testing on such work; the telephone company has no other men to do the testing than the linemen, as the latter knew. There was nothing to prevent Delaney (who was the plaintiff in the case) from testing the guy wire, and the linemen on this job were furnished with all the tools, appliances, and wires with which to test wires of the electric street railway."

The case of *Hector v. Boston Electric Light Co.*, 25 L. R. A., 554, shows the plaintiff was a lineman of the telephone company, and went upon the roof of the building, called the "Youth's Companion Building, for the purpose of affixing a telephone wire to a standard erected upon the roof of that building. He was injured while on the roof by his hand coming in contact with a wire belonging to the defendant (the electric light company), through which an alternating electric light current was being

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transmitted. . . . The plaintiff had a long experience with electrical apparatus, was familiar with all kinds of electrical wires, and the proper methods of handling them, and the dangers attendant upon the business. It was admitted that the defendant was transmitting through these alternating wires an electric current of a thousand volts, which was dangerous under certain conditions. But it was contended that to make such a current dangerous, the person touching a wire must be 'grounded,' as it is called—that is, be connected with the earth by substances that are conductors of electricity, while the other wire of the circuit must be grounded at the same time." The claim of the plaintiff was, in effect, that the alternating electric light wires were not properly insulated. The Court held that the electric light company, on the evidence, owed no duty to the plaintiff to have its wires properly insulated at the place where he received his injury.

The sixth assignment of error, in which objection is made to the charge of the Court, on the theory of a sudden exigency or emergency of the business, is also sustained. This is not the case of an employe ordered by the master, upon a sudden emergency, into a place of danger. There is no evidence that deceased was ordered to ascend this pole and raise the sagging lead cable, but this method of accomplishing the work was chosen by deceased himself, rather than ascend a pole belonging to the telephone company, which stood thirty feet north,

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and which deceased could have ascended and thereby avoided any contact with the wires of the street car company.

The trial Court was also in error in refusing the fourth and fifth instructions submitted by defendants, and embodied in the tenth and eleventh assignments of error on the brief of the telephone company. These supplemental requests embodied the theory of the defendant companies, and should have been given in charge.

For the errors indicated, the judgment is reversed and the cause remanded.

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*(Jackson. June 22, 1901.)*1. BUILDING CONTRACT. *Construction of.*

Under a contract for erection of an oil mill, which binds the contractor, for the sum of \$26,000, to furnish all materials and perform all the work "according to the plans and specifications (made part of contract), and foundations for presses, accumulators and engines to the amount of 120,000 brick—all in addition to that quantity to be \$14 per 1,000 in Portland cement; \$11.50 per 1,000 in Louisville cement"—he is entitled to additional compensation, at the prices stated, for all brick over the estimate of 120,000 used and laid in cement for "foundations for presses, accumulators, and engines;" but not on the 1,120,000 brick used, and laid in mortar, in construction of other parts of the mill, which would give him, extra, the unreasonable sum of \$12,880. (*Post*, pp. 411-422.)

2. SAME. *Same.*

Where a building contract provides for the laying of the main body of the brick in lime mortar, and other portions in Portland and again other in Louisville cement, a change in the specifications allowing the use of the cheaper cement "in all brick work," excepting certain foundations and cappings, relates alone to the brick that are to be laid in cement under the original contract, and does not have the effect to require all brick used in the building to be laid in cement. (*Post*, pp. 419-422.)

3. SAME. *Effect of alterations.*

If a contractor sustains loss of materials, by reason of their being rendered unfit for use, on account of alterations made by the owner in the original plans and specifications, he may recover the amount of such loss from the owner. (*Post*, pp. 424, 425.)

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4. **SAME.** *Contractor's bondsmen not released by alterations of plans, when.*

The surety of a contractor is not released from liability by reason of changes made by the owner in the original plans and specifications, where the contract, made part of his bond, provides for alterations on written order of the architect, and those made were not by enlarging the building or adding new ones, but in matters of detail, though adding more than one-tenth to the cost of the building. In such case, there is substantial compliance with the original plans and specifications. (*Post*, pp. 429-432.)

5. **CONTRACT.** *Rules of construction.*

The chief concern of the Court in the construction of a contract is to ascertain the intention of the parties—the sense in which they understood their agreement. This intention is to be gathered from the four corners of the written instrument, read in the light of the surrounding circumstances. Its language controls, when plain and unambiguous. (*Post*, pp. 415, 416.)

Cases cited: *Polk v. Buchanan*, 5 Sneed, 726; *Barker v. Freeland*, 91 Tenn., 116; *Mills v. Faris*, 12 Heis., 457; *Nunnally v. Warner Iron Co.*, 94 Tenn., 282.

6. **DECREE.** *Authorized by pleadings, when.*

Under a bill filed against a contractor and his surety, and subcontractors and materialmen claiming liens upon the property, by the owner of the property, to save multiplicity of suits and settle the rights of all the parties in a single decree, the owner may have decree against the contractor for any sum he may be compelled to pay in discharge of liens in excess of the contract price. (*Post*, pp. 422-424.)

7. **CHANCERY PRACTICE.** *Concurrent finding of Master and Chancellor.*

Where the Master reports there is not sufficient evidence to fix the amount of a valid claim, and suggests another reference on the point, and the Chancellor concurs, but the party in interest asks no further reference, this Court can grant no relief. (*Post*, pp. 425-427.)

8. **MECHANICS' LIEN.** *Enforceable by cross-bill.*

Where the owner, for the purpose of preventing multiplicity of suits and to settle the rights of all parties by a single decree,

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files bill against a contractor and his surety, and also against numerous subcontractors and materialmen claiming liens on the property, the lien claimants may by cross bill, attaching the property, enforce their claims against same. (*Post*, pp. 427, 428.)

FROM SHELBY.

Appeal from the Chancery Court of Shelby County. F. H. HEISKELL, Ch.

HENRY CRAFT and F. T. EDMONDSON for the oil company.

J. J. DuBOSE and MALONE & MALONE for Eberhart.

McALISTER, J. The defendant (Eberhart), as the result of competitive bidding, was awarded a contract for the construction of an oil mill, in the city of Memphis, for the Perkins Oil Co. The contract price for the work was \$26,000. Eberhart, the contractor, executed a bond with the American Bonding & Trust Co., as surety, in the penalty of \$7,000, for the faithful performance of the work. Toward the close of the work complications arose. Mechanics, laborers, and material men filed notices of liens upon complainants' property, and it was threatened with vexatious litigation and serious loss. Thereupon the present bill was filed by the Perkins

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Oil Co. against Eberhart, the contractor, the American Bonding & Trust Co., his surety, and certain subcontractors and material men, to restrain them from prosecuting separate suits, and to give the Chancery Court jurisdiction of all matters involved. Answers and cross bills were filed by the subcontractors and material men, attaching the realty on which the mill was situated, and asking that their several statutory liens thereon be established. During the progress of the cause the claims of these subcontractors and material men were all paid, and are not now the subject of controversy. The defendant (Eberhart) also filed an answer and cross bill, claiming a balance due from the Perkins Oil Co., of \$21,282.76. An attachment issued, and was levied on the property of the oil company. The bond company filed its answer, alleging that a number of changes in the plans and specifications were made during the progress of the building, and that the mill and seed house were erected, not upon the contract plans and specifications, as originally made, but upon entirely different plans and specifications, made and furnished long after the original contract was entered into; that it was bound only by the contract as entered into, and that as soon as the original contract was changed, and additional plans and specifications were furnished, additional obligations were imposed upon Eberhart, and that the bond company was relieved and discharged from any and all liability under its bond. It denied that it

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was bound on its contract to any extent. It alleged that there was a large outlay of labor and a great amount of extra lumber and material, which had been ordered and prepared for the changes made, which increased the liability of Eberhart to a material extent, and that the bond company was thereby relieved from any obligations whatever under the original contract.

The Perkins Oil Co. answered the cross bill of Eberhart, in which it denied that it was indebted to him in any amount. There was a reference to the Master to state an account between the parties, who, upon the proof, found the sum of \$7,117 to be due Eberhart. Exceptions to the report were filed by both sides, which were overruled by the Chancellor and the report confirmed, excepting an item of \$500, which the Master reported in favor of Eberhart, but which the Chancellor disallowed, thus reducing the claim of Eberhart to \$6,605.36. During the progress of the cause decrees for the sum of \$9,795.91 were rendered against the property of the Perkins Oil Co., in favor of the various subcontractors and material men, which sum was fully paid off by the oil company. On final hearing, the Chancellor pronounced a judgment in favor of the Perkins Oil Co., and against Eberhart, for \$3,190.55, the difference between \$9,795.91, the sum which the oil company was required to pay to the several subcontractors and material men, to satisfy their liens upon the lands and buildings of the oil company,

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and \$6,605.36, the sum found to be due Eberhart, including all extras. The decree of \$3,190.55 was rendered both against Eberhart and the American Bonding & Trust Co., surety on the bond as contractor. Eberhart and the trust company both appealed and have assigned errors.

On behalf of Eberhart the first assignment of error is that the Chancellor erred in his construction of article 1 of the contract between Eberhart and the oil company, which is in the words and figures following, viz.: "Article 1. The contractor, under the direction and to the satisfaction of A. H. D. Perkins, or his supervisor, acting for the purposes of this contract as agents of the said owner, shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings, prepared by the said owner for an oil mill, according to plans and specifications, and foundations for presses, accumulators, and engine, to the amount of one hundred and twenty thousand brick (120,000), all in addition to that quantity to be \$14 per thousand in Portland cement, \$11.50 per thousand in Louisville cement. All fire doors single, which drawings and specifications are identified by the signatures of the parties hereto."

It is said the learned Chancellor, in regard to this clause, held, in effect, that Eberhart was to be paid extra only for brick above the amount of 120,000, used in the foundations for presses, accu-

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mulators, and engine, which said foundations for presses, accumulators, and engine did not require more than 120,000 brick, when, as a matter of law, the learned Chancellor should have so construed said contract as to allow Eberhart compensation for all brick furnished in the building of the entire oil mill above the amount of the 120,000 brick. The entire amount of brick furnished by Eberhart above said 120,000 brick, in the construction of the entire oil mill, is shown to be 1,120,000, the whole amount used being 1,240,000. The total sum thus claimed to be due Eberhart for brick furnished over and above 120,000, amounts to \$12,880.

It is insisted by counsel for appellant that the interpretation of the contract is a matter of law, for the Court, and we cannot look beyond its four corners for light. It is a cardinal rule of construction that all instruments are to be expounded and to have effect given them according to the manifest intention of the parties, as apparent from the whole instrument or agreement, if not incompatible with established principles of law or policy. *Polk v. Buchanan*, 5 Sneed, 726. Again, it was said by the Court in *Barker v. Freeland*, 91 Tenn., 116: "It is an indisputable proposition that, when a contract is in writing and its meaning is plain and unambiguous, its interpretation is a matter of law, for the Court. But, when the writing is not plain and unambiguous, parol evidence is admissible to ascertain the situation and surrounding circumstances,

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the nature and quality of the subject-matter," etc. The sole object of the rules and principles laid down for the exposition of contracts is to do justice to the parties by enforcing a performance of their agreement according to the sense in which they mutually understood it at the time. *Mills v. Farris*, 12 Heis., 457. In ascertaining the intention, the situation of the parties, the motives that led to the agreement, and the objects designed to be effected by it, may all be looked to by the Court. *Nunnelly v. Warner Iron Co.*, 94 Tenn., 282. It is also true, as contended by appellant's counsel, that, in cases of doubt, the instrument will be construed most strongly against the person who actually drew up the paper, or in whose behalf it was drawn.

With these fundamental principles in view, we now proceed to examine the contract. The building for the construction of which the contract was awarded to Eberhart was to be used by the Perkins Oil Co. for the purpose of manufacturing cotton-seed products. It was to consist of a seed shed, to be constructed mainly of wood, and a two-story machinery department, which was to be made exclusively of brick. The plans and specifications upon which the bids were invited covered the entire work to be done, excepting the brick work which was to constitute the foundations for the machinery, such as presses, accumulators, and its engine. These foundations were not included in the plans and specifications because, it is said, it was not definitely known

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what character of machinery would be used, and, also, for the reason that the specifications for such foundations are always furnished by the manufacturers of the machinery. Hence it is shown that the bids were submitted by the contractors without any specifications before them for the brick foundation work. It was estimated that the foundation work would require 120,000 brick, and, hence, that estimate was included in the contract, but all brick used in excess of that quantity were to be charged extra.

The insistence, however, of Eberhart, is that he was to be paid extra for all brick used in the construction of the entire work, including both buildings, in excess of 120,000. The proof is that 1,240,000 brick were used in the buildings, and the contractor's claim is that he is entitled to be paid extra for 1,120,000 brick. This extra compensation would have amounted to \$12,880, while the contract price for the entire work, excepting the machinery foundations, was only \$26,000. Is it reasonable to suppose that the parties ever contemplated such a construction of the contract?

The contract stipulates that the contractor is to furnish *all* the material and perform all the work mentioned in the plans and specifications for an oil mill. The brick building would require at least 1,120,000 brick in its construction, and yet, according to the contractor's contention, the contract only obligates him to furnish 120,000 brick, and for all

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over that quantity he was to be allowed extra compensation. But the context shows that the enumeration of 120,000 bricks in the contract was simply an estimate of the quantity that would be necessary in the machinery foundations, and, as such foundations must be laid in cement, and, for that reason, more expensive, it was provided that all brick used in excess of that amount should be paid extra, the price depending upon the quality of cement that might be used. As a matter of fact, only 120,000 brick were used in the machinery foundations, and the balance of the 1,120,000 brick for which Eberhart was claiming compensation were used in the building proper and were laid in common mortar. But the contract only allows extra compensation for brick laid in cement. All of the brick work, excepting the foundations for presses, accumulators, and engines, is set forth in the plans and specifications. It is inconceivable that a contractor who engages to furnish all the material for the construction of a brick building at a stipulated price should be entitled to extra compensation for the brick used in the structure.

The only reasonable construction of this contract, as we see it, is that the contractor was to be paid extra for all brick used in the machinery foundations in excess of 120,000. This was the understanding of all the competing contractors at the time the bid was awarded to Eberhart, and, so far as we can see, the latter made no contrary claim dur-

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ing the progress of the work, but his whole conduct was inconsistent with such a contention. The record shows that when Eberhart first presented his bill for extras, under the reference in this cause, he did not include the 1,120,000 brick, and made no such claim. So that, whether the contract be interpreted from its face alone, or in view of all the surrounding circumstances, it is very evident that Eberhart contracted, for the sum of \$26,000, to furnish all the material and construct the buildings called for by the plans and specifications, excepting the machinery foundations for presses, accumulators, and engines.

If the brick used in these foundations exceeded 120,000, the contractor was to be paid extra, but if not, this work was also included in the original contract. The Clerk and Master, in executing the order of reference, so construed it.

In addition to this, the fact that the foundations for the machinery were to be laid in Portland and Louisville cement, and not in common mortar, the compensation of \$14 per thousand for Portland cement and \$11.50 per thousand for Louisville cement, related alone to the foundations for presses, accumulators, and engines. If counsel for Eberhart is correct in his construction of this contract, then no provision whatever is made in the contract for the brick laid in common mortar, and yet, probably seven-eighths of the brick used in the building were laid in common mortar. Complainant's counsel, in

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answer to this position, cites the following provisions of the contract, which he insists relate to brick other than those used in the foundations, to-wit: "Walls above the main floor to be laid in rich lime mortar, to within eight courses of the top, when mortar must be used same as in foundation. All top walls in main building to be covered with Portland Cement, neatly finished after roof is on."

Counsel say: "It will thus be seen that the top eight courses of brick and the capping itself were to be practically the same as the foundations, and the rest of the brick above ground was to be in rich lime mortar. But we find that these specifications were changed by an addition, viz.: Louisville Black Diamond cement to be used, instead of Portland cement, in all brick work, except engine foundations and the capping or finishing touches on walls, which will be Portland."

"It will thus be seen," says learned counsel, "that by this important change in the specifications the foundations for the machinery and the capping were to be Portland cement as before, but that all brick work besides was to be finished in Louisville cement. Clearly, then, the intention of the parties, at the time the contract was executed, was that none of this work should be laid in ordinary mortar. All that not laid in Portland cement was to be laid in Louisville cement."

We have thus quoted, in full, the exact position of complainant's counsel on this subject. It is not

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claimed that the brick in the main building, outside of the foundations, were actually laid in cement, nor is there any proof to that effect. Eberhart, in his cross bill, does not claim that the brick for which he is now asking extra compensation was laid in cement, nor does he testify that as matters of fact that all the brick work was laid in cement. The original specifications are clear upon that point, and afford us, with reasonable certainty, a basis upon which to determine about what proportion of the brick was to be laid in cement and what proportion in lime mortar. The provisions of the specifications upon this subject are as follows: "All foundations are to be hard, well-burned brick, and are to be laid in cement mortar. All mortar to be made of fresh, unslacked, Alabama lime, and sharp, washed, cleaned, and screened sand, and to be made ten days before using. Walls above main floor to be laid in rich lime mortar. The foundations for machinery, which will consume about 125,000 brick, to be laid in Eagle brand cement or its equal. Bids on machinery foundations to be made per thousand."

We are of opinion that the changes in the specifications, upon which complainant's counsel rely, relate only to the character of the cement to be used, and was not designed to affect the quantity of brick that should be laid in cement and the amount to be laid in common mortar. The modification of the specifications was simply intended to permit Louis-

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ville cement, which was less expensive to be used in all brick work which the contract required to be laid in cement, instead of Portland cement, except in engine foundations, where Portland cement must still be used. The change, in our opinion, does not affect the quantity of brick at all. The Clerk and Master, in executing the order of reference, so construed the contract, and stated his account on this basis, thus disallowing the claim of Eberhart for extra compensation for 1,120,000 brick. The Chancellor so construed the contract and confirmed the report of the Master. We predicate nothing upon the concurrent findings of the Master and Chancellor upon the facts so ascertained, for the reason that the construction of the contract is matter of law for the Court. We, however, fully agree with the Chancellor in his interpretation of the contract.

It is insisted, however, that the decree against Eberhart for \$3,190.55, was wholly unwarranted by the pleadings. It is said that in no pleading does the Perkins Oil Co. claim that Eberhart owes it anything or will owe it anything on final accounting. It is said that the bill was not filed to obtain decree against Eberhart, but that the object was to protect the company against a multiplicity of suits threatened by the various subcontractors and materialmen. Counsel is mistaken, however, in his assumption that no judgment was asked against Eberhart. The bill, after setting forth the complications about to arise from the threatened suits of the lien claimants,

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states, viz.: "That when all of said claims have been presented to the Court, the Court will pass upon them in connection with all questions between complainant and defendant, Eberhart, and defendant, The American Bonding and Trust Co., so that in one decree and at one time the rights of all the parties may be fixed.

"If, by this proceeding, the Court shall adjudge any liability as against complainant, under the claims of the various defendants, which shall, together with the complainant's claim for damages, arising from the failure of defendant, Eberhart, to carry out his contract, exceed the balance now in complainant's hands, of the contract price, together with the amount due for extras, then, and in that event, complainant is advised it is entitled to a judgment for such amount, together with the amount of whatever expense it shall incur for Court costs, etc., against the defendant, The American Bonding and Trust Co., under the conditions and provisions of its bond hereinbefore set out."

The bill asks for an account and contains a prayer for general relief.

The American Bonding and Trust Co., as the surety of Eberhart for the faithful performance of the work, was made a party defendant, because complainant expected to recover a judgment against Eberhart and would look to the bond of the Trust Co. for indemnity. Moreover, it is shown by the correspondence in the record that whenever lien

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claims were filed by contractors and materialmen against the property of the Perkins Oil Co., during the progress of the work, that company promptly notified the bonding company, thereby indicating that it expected to sustain a loss on the contract by reason of the enforcement of mechanic's lien, which Eberhart had failed to satisfy. So that we think it clear that the Perkins Oil Co., prior to the date of filing its bill, was apprehensive of sustaining a loss on this contract, and intended to look to Eberhart and the trust company. Moreover, the facts stated in the bill are sufficient, under the prayer for general relief, to have warranted the personal judgment against Eberhart and the bonding company.

The second assignment of error is, viz.: The learned Chancellor erred in holding that Eberhart was not entitled to recover from the Perkins Oil Co. the full value of the lumber and the various woodwork, which became useless to Eberhart because of changes in the plans and specifications made by the Perkins Oil Co. itself. The complainant having, by its own fault, caused these plans and specifications to be changed, the loss should fall upon it. In addition to this, the said lumber and woodwork was left with the complainant company, was retained in its possession, and used by its officers, agents, and servants. It should, therefore, be compelled to pay for what it took and used.

In support of this assignment, counsel for appellants states, viz.: In this assignment of error are

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included the thirteenth exception of Eberhart to the report of the Clerk and Master, in which he claims \$665.25; also the fourteenth exception, in which he claims \$437; exception fifteen, in which he claims \$159.60; exception eighteen, in which he claims \$171.84; the twenty-first exception, in which he claims \$65.32. All of these claims were disallowed.

The total amount of these claims under these different exceptions is \$1,499.09. We will state, as a general proposition, what is claimed in all of these exceptions. It is substantially this: The Perkins Oil Company, by contract with Eberhart, employed him to erect an oil mill for the company. In the erection of this mill certain plans and specifications were to be followed, and the parties signed a contract which made the plans and specifications a part thereof. Now, after the contract was made, the Perkins Oil Company, of its own accord, made many changes in the original plans and specifications. In changing these plans and specifications a great deal of lumber, woodwork, etc., furnished by Eberhart, became utterly useless. For instance, he would order an eight-foot plank, and after it had come, the company would change the plans so that a ten-foot plank, instead of one of eight-foot dimensions, would be required, so the eight-foot plank would be thrown away and would then become a dead loss to Eberhart.

The Clerk and Master, in disposing of this matter, says in his report, viz.: "13. The Master, in

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his report, intended to say something about the lumber left over on account of change of plans, but inadvertently failed to do so. It is impossible from the proof to ascertain just what amount of lumber was left on the ground, what was used by the Perkins Oil Co., and what is still there, and who is chargeable with what remains. Eberhart says he left there fifty or sixty thousand feet. He should have measured it, and been able to state exactly how many feet was left on the ground if he intended to charge for it, and in like manner the Perkins Oil Co. should have kept a strict account of lumber used by them (or better, not used any of it), if, as they contend, it belonged to Eberhart. Mr. Perkins says that they used some, probably, five or six thousand feet. Critchell also testifies that he used a good deal of it in work of building house for rope crossing, house to house cover conveyers, for gutters and fences, but he says he does not know how much. It would not do to charge the Perkins Oil Co. with all of this two by eight lumber, simply because it was not used in this particular place; it might have been used elsewhere, or hauled away, as the proof shows Eberhart did haul several loads of lumber away, as testified to by Critchell. The Master sees no way to arrive at the fact as to this item without a reference as to same. The Master has allowed for the difference between two by eight and two by ten rafters at a full price. Exception overruled."

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It will thus be seen that the Master found that the evidence was not sufficient to warrant him in sustaining these exceptions, and suggests a reference on this matter for further proof. Counsel for Eberhart, however, made no application for a reference, and the report of the Master was confirmed by the Court. The concurrent finding of the Master and Chancellor, in respect of this matter of fact, is conclusive, there being some evidence to support it.

The first assignment of error made on behalf of the bonding and trust company is that jurisdiction of the property, by attachment, for the assertion of mechanic's lien, cannot be acquired on cross bill, it appearing that the property was not brought before the Court by the original bill or attachments or other process issued under it. It appears that the claims of lienholders are all based upon cross bills and attachments issued thereunder. It is, then, insisted the attachments issued upon the prayer of the several cross bills being illegal, the bonding and trust company is not bound by any decree based thereon. The original bill in the cause was filed in the nature of a bill of interpleader against all the parties in interest, with a view of preventing a multiplicity of suits and settling the rights of all parties in this litigation.

The lien claimants were all made defendants, and filed answers and cross bills attaching the property of the Perkins Oil Co., with a view of asserting their several liens.

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A mechanic's lien is enforced by attachment, either at law or in equity. The complainant could not, of course, bring the property before the Court by attachment under its original bill, and we can see no objection to the issuance of original attachments under the prayers of the cross bills. "A bill of this kind (cross bill) is usually brought either to obtain a necessary discovery of facts, or to bring before the Court new matter in aid of the defense to the original bill, or to obtain full relief for all parties, or some affirmative relief touching the matters of the original bill." Gibson's Suits in Chancery, Sec. 662. "A cross bill may be filed for relief whenever any question arises between the defendant and complainant, or between two defendants to the bill, that cannot be determined completely without a cross bill, or cross bills, to bring any matter in dispute completely before the Court, to be litigated by the proper parties and upon the proper proofs. In such cases it becomes necessary for some one or more of the defendants in the original bill to file a cross bill against the complainant and one or more of the other defendants to that bill, and thus to bring the litigated points fully before the Courts." Gibson's Suits in Chancery, Sec. 664; Story's Equity Pleadings, Sec. 392. It is well settled that, "When a cross bill seeks affirmative relief, it partakes of the nature of an original bill." Gibson's Suits in Chancery, Sec. 664; Story's Equity Pleadings, 398.

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Hence we conclude that jurisdiction of the property was acquired by the attachments issued under the cross bills.

The American Bonding and Trust Co. assigns error to the decree below, viz.: (2) "The trial Court erred in rendering a decree against the American Bonding and Trust Co., for the reason that the changes made in the plans and specifications and the large amount of extra work required to be done was not made in accordance with the terms and conditions of the contract under which the bond was issued. First, in this, that the alterations made in the work shown and described by the drawings and specifications were not made upon the written order of the architect, and the value of the work added or omitted was not computed by the architect, and the amount of extra work so ascertained was not added to the contract price by the architect (article 3 of the contract, page 16 record, Vol. 1), and, second, that the changes made in the plans and specifications were so radical, and the burden imposed upon the contractor, Eberhart, was so much greater than those provided in the original contract, and under which the bond was made, that the bond company are entirely relieved from any obligation whatever under its bond."

Article 3 of the contract provides that: "No alterations shall be made in the work shown or described by the drawings and specifications except upon a written order of the architects, and, when

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so made, the value of the work added or omitted shall be computed by the architect, and the amount so ascertained shall be added or deducted from the contract price.”

The bond provides that the written contract entered into is attached to the bond and made a part thereof, and it is insisted that any changes or variations from the conditions in the contract affected the surety on the bond. It is claimed, on behalf of the bonding company, that the extras and changes made in the contract from the time it was executed until the building was completed amounted in value to \$6,291.73. It is then stated that there is no proof or statement made in the record by any witness that any of the changes in the work, as shown by the original drawings and specifications, were made upon the written order of the architect, nor is there any statement or proof that the value of the work added or omitted was computed by the architect, and the amount so ascertained added to or deducted from the contract price.

Counsel for appellants are mistaken in the assumption that the cost of the extra work, over and above the contract price, was \$6,291.73. The Clerk and Master found, as a fact, that the total cost of the extra work was \$3,090.29. The Chancellor concurred with the Master, and this finding of fact is, therefore, conclusive, there being evidence to support it.

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Complainant is not seeking, in this action, to hold the bonding company for this extra work, but to recover the sum of \$3,060.01, the total amount required to be paid out by the Perkins Oil Co., to mechanics and material men, over and above the contract price. The proof shows that the total amount actually paid out by the Perkins Oil Co. was \$32,150.30. Deduct from this the sum of \$3,090.29, the cost of the extra work, for which the oil company makes no claim against Eberhart, and there remains \$29,060.01. But, under the original contract, the oil company was only liable for \$26,000; hence it has been compelled to pay out the difference between \$29,060.01 and \$26,000, which is \$3,000.01, and interest, in excess of its contract.

We do not find that any material alteration of the plans and specifications was made during the progress of the work. A number of expert building contractors and mechanics, after the completion of the work, made a thorough inspection of it, with the plans and specifications before them. Each of them testified on the trial that the buildings were constructed practically according to the plans and specifications, and that no material changes were made. The changes made were in respect to the details of the work, and there were no changes in the plans and specifications enlarging the buildings or adding new buildings.

The only change specifically referred to in the brief of counsel is that a wall was partially torn

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down and certain braces were placed in the ventilators. We find, from Eberhart's deposition and the testimony of Thomson, that certain other changes were made, but we do not think they altered the original plans. The contract between the bonding company and the oil company must have a reasonable construction, and where it appears that the original plans and specifications have been substantially complied with, there is no ground for complaint.

The decree of the Chancellor is, in all respects, affirmed. The costs of the appeal will be paid by appellant.

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READ v. MEMPHIS GASLIGHT CO.*(Jackson. June 22, 1901.)*

MORTGAGES AND DEEDS OF TRUST. *Allowances to trustee for expenses and attorney fees.*

Under a corporate deed of trust, made pursuant to and embodying a resolution of the Board of Directors of the mortgagor company, providing that the "deed should confer upon the trustee all proper and necessary power and authority for the protection and security of the holder of the bonds," and under and by the general principles of law without such special provision, the trustee is entitled to reasonable allowances, out of the trust fund or estate, for his time and trouble and for expenses necessarily incurred, including attorney fees, in the defense of a suit brought against him attacking the trust deed; and such allowances constitute a prior lien upon the trust fund or estate, and are enforceable against it by proper proceedings.

Cases cited: *Fulton v. Davidson*, 3 Heis., 614; *New Memphis Gaslight Co. case*, 105 Tenn., 268.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County. F. H. HEISKELL, Ch.

CARROLL, MCKELLAR & BULLINGTON for Read.

B. W. HIRSH and RIDDICK for Memphis Gaslight Company.

McALISTER, J. The question presented for decision upon this record is in respect of the right

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of a trustee to compensation for his time and trouble, and to an allowance for expenses incurred, including a reasonable fee to the solicitor who represented him in certain litigation. The facts necessary to be stated are that, in 1873, the Memphis Gaslight Co. executed a trust deed to the complainant, S. P. Read, as trustee, to secure the payment of 250 bonds of \$1,000 each (\$250,000). Creditors and stockholders of the Memphis Gaslight Co., in different suits, attacked the validity of this trust deed, making the complainant trustee a party defendant in each case. These causes were consolidated and finally determined by this Court at last term here, and are reported in 105 Tenn., 268. The trustee employed counsel, and answers were filed denying the allegations made against this deed, and the litigation was defended in the Chancery Court and in this Court. In that case this Court said that "the trustee was under legal obligation to protect this trust deed, assailed as it was, and that he was authorized to employ a lawyer to this end, and that the gentleman so engaged rendered valuable services to his client. But, said the Court, the fixing of the fee and the security for its payment must be between the two. There is no fund under the control of the Court upon which it could fix a lien, and no adverse parties against whom a decree in his favor could be rendered. To determine the amount due for the solicitor's service or to grant a lien in these cases would be *brutum fulmen*."

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The present bill was filed on September 21, 1900, by S. P. Read, trustee, against the Memphis Gaslight Co., the Equitable Gaslight Co., the Colonial Trust Co., of New York, and the unknown holders of the first mortgage bonds of the Memphis Gaslight Co., the object of which was to recover, first, the expenses incurred by the trustee in the administration of the trusts of the mortgage, including a reasonable compensation to the solicitor employed, and, second, a reasonable compensation for himself, on account of his responsibility and services in respect of the defense of the said litigations.

The defendants, the Equitable Gaslight Co. and the Memphis Gaslight Co., filed the following demurrers: First, it is denied that it was the right and duty of the trustee to retain counsel to defend the suits mentioned in the bill, and, second, it denied the right of the trustee to have spent time, or performed labor or incurred responsibility therein.

The cause was heard upon the two assignments of demurrer, and, upon leave being granted, an additional ground of demurrer was filed; and defendants, also, demur to the complainant's bill, on the following ground: "Even if the trustee, Read, had the implied right and power to employ counsel in the lawsuits referred to in his bill, he had no right to make the fees of said counsel a lien or charge upon the property covered under the trust deed, nor had he any right or power to charge the maker or beneficiaries under the trust deed, nor any

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of the defendants, with the responsibility for such fees. If he undertook to employ counsel without direction from the Court, or without authority from the makers or beneficiaries under the trust deed, then it might be that he would make himself responsible for the fee of such counsel. The fixing of this fee, and the security for its payment, would be a matter of contract between the trustee and counsel employed by him, and the trustee's responsibility would depend upon this contract. Suit might be brought on such contract against the trustee, but in no event, as defendants contend, could the trustee and his counsel, by any arrangement between them, charge either the corpus of the property or the makers or beneficiaries under the trust deed, or any of the defendants, with the responsibility for such fee. But said trustee, in his bill, does not charge or claim that the employment by him of complainant, McDowell, was done under the direction of the Court, or after consultation with the maker or any of the beneficiaries under the trust deed. And so defendants say, that if said counsel has any redress, it is against the trustee employing him, and not against either the property conveyed in the trust deed or any of these defendants."

The Chancellor sustained all the demurrers and dismissed the bill. Complainant appealed and assigned the action of the Chancellor as error. It will be observed that two questions are raised by the pleadings. First, whether the trustee is entitled to any

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compensation for his own services and trouble in and about the litigation; and second, whether he is entitled to an allowance for expenses incurred, including a reasonable fee for his counsel.

The position of counsel for complainant is that the trustee is entitled to recover, as an expense incurred, the counsel fee of the solicitor he employed to defend the litigation in the interest of the trust estate; that that claim is a lien upon the trust estate, and unless it is paid he is entitled to have the trust estate sold for the payment thereof; and further, that in equity the *cestui que trust* are liable for the payment thereof. In support of this proposition counsel cites *Woodruff v. The N. Y. & Lake Erie & Western R. R. Co., et al.*, 129 N. Y., 27, in which it is said, viz.: "It is a cardinal principle in the disposition of trust estates that the trust fund shall bear the expenses of its administration, and that one who successfully conducts a litigation *en autre droit* for the benefit of a fund, shall be protected in the distribution of such fund, for the expenses necessarily incurred by him in the performance of his duty." *In re Holden*, 126 N. Y., 589; *Trustees v. Greenough*, 105 U. S., 527.

It is laid down as an elementary rule, in *Perry on Trusts*, that trustees have an inherent equitable right to be reimbursed all expenses which they reasonably incur in the execution of the trust, and it is immaterial that there is no provision for such expenses in the instrument of trust. If a person un-

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dertakes an office for another, in relation to property, he has a natural right to be reimbursed all the money necessarily expended in the performance of the duty. Lewin on Trusts, 557; Perry on Trusts, Sec. 910.

This right is extended not only to necessary traveling expenses, but to all reasonable fees paid for legal advice in the discharge of his duties, and in most of the States includes compensation for time labor, and trouble. Perry on Trusts, Secs. 910, 917, 918.

It was held in *Wetmore v. Parker*, 52 N. Y., 450, that this Court has decided in two cases (*Downing v. Marshall* and *DeCourville v. Ray*, 57 N. Y., 380) that the special term has power to make allowances to trustees and others acting in a fiduciary capacity, for all expenses necessarily incurred in the faithful performance of their duty, including counsel fees.

In *Downing v. Marshall*, *supra*, the Court said that persons acting *en autre droit*, as executors, administrators, trustees, guardians, receivers, etc., are, upon a faithful execution of their trusts, to be indemnified out of the trust property for all expenses necessarily incurred in the faithful performance of their duties. There can be no reasonable doubt that the general rule is that trustees and others, acting in a fiduciary capacity, are entitled to reasonable allowances for costs and expenses incurred in the course of the performance of their duties, out of

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the fund which has been secured or protected by their efforts." *Dow et al. v. Memphis & Little Rock R. R.*, Fed. Rep. 32.; *Dow et al. v. Memphis & Little Rock R. R.*, 120 U. S., 287.

In the last case the mortgage provided that the appellant will, from time to time, pay all charges, costs, and expenses of the appellees, or either of them, in and about the execution of the trust, and will indemnify and hold harmless the appellees against all costs, charges, damages, and expenses, which they or either of them may sustain or may be put to in consequence of accepting this trust, or anything which may be done, or omitted to be done, under it, saving only such damage as may be incurred by or arise from the culpable act or neglect of said appellees. The Court, in that case, gave judgment against the mortgagor for \$29,580.87, amount due the trustees for services and counsel fees and costs paid out by them. See, also, *Medough v. Wilson*, 151 U. S., 333. Counsel also cite *Fulton v. Davidson et al.*, 3 Heis., 614; *Burney v. Atkinson*, 54 S. W. Rep., 998. Counsel then cite the former opinion of this Court in the consolidated cases, 105 Tenn., 268, in which we said that the trustee was under legal obligation to protect this trust deed, assailed as it was, and that he was authorized to employ a lawyer, and that the gentleman so employed (Hon. Wallace W. McDowell) had rendered valuable services to his client.

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As opposed to contention of the complainant, it is insisted, on behalf of the defendant, that the powers of the trustee are dependent entirely upon the mortgage or trust deed appointing him, and that it is not admissible to look outside the instrument for the trustee's authority. It is argued that there is no especial authority to the trustee, conferred by this trust deed, to employ counsel to defend any suits which might be brought attacking the validity of such trust, and hence there can be no recovery for such services. Counsel cite Thompson on Corporations, Vol. 5, Sec. 6264, viz.: "No arrangement among the trustees in a corporate mortgage and the corporation and third parties, not assented to by the beneficiaries thereunder, will be allowed to have the effect of charging the trust with the payment of subsequent debts. Neither the trustee nor any agent appointed by him is competent to create such a charge."

Mr. Thompson, in Sec. 6126 of his work, discusses the power of the trustee to charge the trust estate with counsel fees, concluding as follows, to wit: "The writer suggests that the decisions which hold the bondholders bound by representation through the trustee in the mortgage, except where the trustee brings an action to foreclose the mortgage, have failed to discriminate properly in respect of the consideration that the trustee, in such an instrument, is a trustee only of the powers which have been especially granted to him by the instrument, and

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which he has accepted by accepting the trust. If the instrument requires him to defend any litigation affecting unfavorably the rights of the bondholders, then there is ground for concluding that when he does so defend he will bind the bondholders by representation. But if it does not require him to do so, his act in defending is no more than the act of a stranger, for, in doing it, he is attempting to exercise a power which has not been conferred on him, and to do something for them which they have not authorized him to do, or agreed that he shall do."

Now, conceding for the argument, that Mr. Thompson is correct in the rule thus enunciated, we find ample authority in the trust deed to have warranted the trustee in employing counsel to defend the attacks made upon the instrument itself. The resolution, adopted by the Board of Directors of the Memphis Gaslight Company, directing the deed of trust to be executed, provided "that the said trust deed should confer upon the trustee all proper and necessary power and authority, for the protection and security of the holder of the bonds." This resolution is embodied in the deed of trust, afterwards executed, to S. P. Read, trustee; but it is insisted that the only power actually conferred upon the trustee, by the deed itself, is to sell the property and make deeds to the purchasers. It is then argued that the presumption is that the directors did what they resolved to do, and the powers ac-

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tually conferred upon the trustee was an execution of the power conferred by the resolution. We think, however, that the resolution is not to be so restricted. It is embodied in the trust deed, and has thus become a part of the instrument itself, and is equivalent to an express grant in the deed to the trustee "of all proper and necessary power and authority for the protection and security of the owners or holders of said bonds." It was with reference to this power that we held, at last term, that "the trustee was under legal obligation to protect the trust deed, assailed as it was, and that he was authorized to employ a lawyer to this end." It was also said that the fixing of the fee, and the security therefor, was a matter for the trustee and his counsel, for the reason that there was no fund before the Court, and no adverse parties against whom a decree in his favor could be rendered.

The present bill is filed against the Memphis Gaslight Company, the maker of the trust deed, the Equitable Gaslight Company, which is the present owner of the property embraced in the trust deed, and also as the owners of a considerable number of the first mortgage bonds of the Memphis Gaslight Company, the Colonial Trust Company, of New York, and the unknown holders of the first mortgage bonds of the Memphis Gaslight Company. The claim of the bill is that both complainant and the counsel representing him in said litigation, are entitled to propound herein as against the

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defendants, and against the property covered by the mortgage, their claim, and that they are entitled to set up and establish as against the trust estate, and enforce the same, the reasonable amounts which they are severally entitled to have allowed them, and that they have a lien therefor upon the property mentioned and described in the said mortgage, superior and paramount to the mortgage itself, etc. The property covered by the mortgage was "all the franchises, rights, town lots, grounds, buildings, manufactories, and machinery owned by the Memphis Gaslight Company." It is further alleged that the property covered by the trust deed is now owned by the Equitable Gas Company, subject to the mortgage of \$1,250,000 of 5 per cent. bonds.

We think that, upon the allegations of the bill, complainants are entitled to relief. The decree of the Chancellor is, therefore, reversed, the demurrer overruled, and the cause remanded for further proceedings.

Citizens' Street Railroad Co. v. Shepherd.

CITIZENS' STREET RAILROAD CO. v. SHEPHERD.

(*Jackson*. June 24, 1901.)

1. STREET RAILROADS. *Duty of motorman as to preventing collisions.*

It is not the duty of a motorman in charge of and operating an electric street car to stop or even check the speed of his car upon observing a wagon or other moving object on the track ahead of him, unless, by reason of the nearness of the object, or other circumstances, it would appear to a reasonably prudent man that a collision would probably occur unless he did so. The motorman has the right to act upon the assumption that the wagon or other moving object will clear the track in due time until the contrary becomes reasonably manifest, and then it is his duty to prevent the accident, if possible, by the use of all reasonable means in his power. (*Post*, pp. 445-449.)

2. CHARGE OF COURT. *Contradictory clauses.*

An erroneous proposition in the Court's charge is not cured by another contradictory or inconsistent one that is correct. The parties are entitled to a clear and consistent charge as well as a correct one. (*Post*, pp. 449, 450.)

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County.

WRIGHT, PETERS & WRIGHT for Citizens' Street Railroad Co.

JOHN E. BELL for Shepherd.

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SNODGRASS, Ch. J. The defendant sued plaintiff in error for damages sustained through a collision between a street car and a market wagon, driven by Shepherd along by or on the track of the railroad company, and in which he sustained personal injuries. He recovered \$3,500, and defendant company appealed and assigned many errors. The theory of the plaintiff was that he was driving upon the track and was negligently run down and injured; that of defendant was that he was driving by the side of the track and turned too close in, so that, after an effort to warn him and before defendant could stop its car, it ran against one of the fore wheels, stopping just as it touched it, and throwing plaintiff out; or, in any event, if on the track when first seen, the approach to him was slow and with abundant warning to attract his attention; and defendant's servants believed he would avoid the collision, and did themselves what they reasonably could to avoid it, and only failed by the least progress beyond the point where he was leaving, so as to strike only one of his wheels, and that it was a mere accident and not due to negligence on the part of its servants, but to that of plaintiff, and, in any event, he proximately contributed to the injury, and, therefore, could not recover, or if he did not thus contribute, his remote negligence was sufficient to so abate his recovery as to make the amount allowed excessive.

There was evidence tending to support the theories of both parties, and the usual conflict of evi-

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dence as to the actual facts; and it is in relation to the charge in this connection that we propose to devote any discussion or predicate any action, for although there are some assignments and much argument going to the admission of evidence, we think there is nothing vital in the objections thus made, whether or not they be well taken. We pass in the same way the assignments and arguments regarding the charge on evidence. It does not all bear the close and elaborate analysis of defendant's counsel. Neither do we think the jury understood it as he does, but it practically meant about what the law is according to the way a not too critical or hypercritical jury would have, and doubtless did, understand it.

Many of the remaining twenty assignments can be properly disposed of in the same way, but among the assignments are some vitally objectionable. Among them are assignments sixth, seventh, sixteenth, seventeenth, and eighteenth.

Assignment sixth is as follows: "The Court erred in charging the jury as follows: 'This superior or preferential right, which the law gives to the street car company, requires of persons who desire to use the track, while driving along it, to look back at reasonable intervals to ascertain whether a car is coming, so that they may leave the track and not unnecessarily impede the progress of the car. But the failure on the part of the driver to look back for a car coming up in the rear does not, of itself,

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make the act one of negligence, provided it is daylight and there is no obstruction in the way of the motorman seeing the driver and vehicle.' ”

Assignment seventh is as follows: “The Court erred in charging as follows: ‘So that, if you further find from the evidence that there was no obstruction in the way to prevent the motorman from seeing Shepherd, as he drove out of Boyd Avenue and drove along Vance street, and Shepherd drove upon the track at a distance far enough ahead of the car, which was being operated by Amos, the motorman, to have enabled any ordinarily careful person to have stopped his car, if need be, to avoid a collision, where the motorman had been on the lookout and had his car under control, then the Court charges you that it was negligence on the part of Amos, the motorman, to have collided with Shepherd, the wagoner, and whatever injuries Shepherd received, in consequence of such injuries, he has the right to recover for.’ This should have been qualified by the quotation from Mr. Booth ‘that a motorman has a right to assume that a person who is upon the track, and apparently capable of taking care of himself, will leave it before the car reaches him, and that he can indulge in this presumption until the danger of a collision becomes imminent.’ ”

Assignment sixteenth is as follows: “The Court erred in refusing the sixth special instruction requested by the defendant, which is as follows: ‘If

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the jury believes from the evidence that Henry Shepherd came out of Boyd avenue on to Vance street, when the motorman was some distance west of the intersection of Boyd avenue and Vance street, and that Henry Shepherd turned east upon the track; and at that time there was no danger of collision to Henry Shepherd by being run into by the car; and if they further believe that Henry Shepherd proceeded east upon Vance street in the tracks of the street car company, and in the tracks upon which the car that was coming east was running, then the motorman had the right to assume that Henry Shepherd would leave the track before the car reached him, and the motorman had the right to rely upon this presumption until the danger of a collision became imminent, then it became the duty of the motorman to use ordinary care to stop his car and prevent an accident; and if the jury believe that the motorman did use ordinary care after he saw, or by the exercise of ordinary care should have seen that the danger of a collision was imminent, then there could be no recovery in this case.' "

And to the same effect assignment seventeenth, which is as follows: "The Court erred in refusing the seventh special instruction requested by the defendant, which is as follows: 'If the jury believe from the evidence that Henry Shepherd entered Vance street at Boyd avenue, some distance in front of the car, the motorman was under no obligation at

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that time to stop his car in order to prevent an accident—that is, if the danger of a collision at that time was not probable, but the motorman had the right to run his car following Henry Shepherd, and had the right to assume that Henry Shepherd would get out of the way until he saw, or by the exercise of ordinary care could have seen, that the danger of a collision did become imminent, but no longer.' ”

The eighteenth assignment of error is as follows: “The Court erred in refusing to give the eighth special instruction requested by the defendant, which is as follows: ‘You are to say from the evidence when it became the duty of the motorman to attempt to stop his car and prevent the collision, and if you believe, from the evidence, that an ordinarily prudent man would not have attempted to stop his car, to avoid the collision, until Amos did attempt to stop his car and avoid the collision, then there can be no recovery, no matter whether Henry Shepherd was guilty or not.’ ”

The argument of plaintiff, that these requests were not a law, had been given, or were in other equivalent statements of the Court so far as they were law, and, therefore, already in the charge, is not well made. Some of the objections are met by suggestions of similar purport in the charge, followed by contradictory propositions. These do not cure errors. They only intensify them or make accurate understanding of the charge impossible. We

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have repeatedly held that inconsistent and contradictory statements do not neutralize or validate each other, but are vitally erroneous. Several of these are pointed out in argument. It is not necessary to elaborate them here. The parties are entitled to a clear and consistent charge, as well as a correct one, that justice may be reached. This is a large verdict. On one theory it may be, notwithstanding this, not so large or extravagant as to indicate caprice or passion, or other reversible error here, but it, at least to be sustainable, must appear to be based on a clear and sound exposition of the law applied to the facts. As it is not so, we are constrained to reverse it and award a new trial.

Thompson v. Keck Mfg. Co.

THOMPSON v. KECK MANUFACTURING COMPANY.

(Jackson. June 4, 1901.)

DECREE. *Coram non judice.*

A decree for debt and costs rendered against a mere formal defendant in an action by creditors against their debtor and others to recover their debts and set aside fraudulent conveyances of his property is *coram non judice* and void.

Cases cited: Bank v. Carpenter, 97 Tenn., 437; Randolph v. Bank, 9 Lea, 63; Rogers v Breen, 9 Heis., 679; Easley v. Tarkington, 5 Bax., 592.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, Ch.

SMITH & TREZEVANT for Thompson.

R. P. CARY, R. G. BROWN, and CARUTHERS
EWING for Keck Manufacturing Company.

BEARD, J. The bill in this cause is filed to impeach a decree pronounced against complainant in the case of *Keck Manufacturing Company v. V. B. Thayer et al.*, and *Champenois v. V. B. Thayer et al.* This decree was for large sums of money, and

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was entered on January 30, 1899. Several grounds of impeachment are averred by complainant, but as one of these is decisive of the case, it will alone be considered. The ground referred to is that the decree was without pleadings, and so was *coram non judice* and void.

The bills in the two causes in which the decree was rendered were filed by creditors of V. B. Thayer, of Memphis, who had a short time before made two assignments of his stock of merchandise to one Barchas as assignee. The complainants, who were creditors of Thayer, assailed these instruments on many grounds not material to be mentioned in the present case. The bills also alleged that Barchas, after having sold a considerable part of the stock at private sale, had advertised that he would receive bids for the remnant of the same on February 15, 1893; that the defendant, Thayer, in company with four others, one of these, being the present complainant, Thompson, had applied for and were granted by the proper authority, a charter to carry on a mercantile business in the name of the "Thayer Jewelry Company," and to this company, when organized, the assignee had transferred as purchaser so much of the stock as then remained in his hands. The bills then alleged that no one of the parties, who thus joined Thayer in setting on foot this corporation, had more than one share of its stock, and that the money to pay for this share had been furnished the respective shareholders by

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Thayer, and that, in fact and in law, the corporation was simply Thayer, and that the property so transferred was subject to the payment of the debts due from him to complainants. Discovery was asked from the various shareholders as to the amount of stock held by each, and the amount of money contributed, and by whom, to pay for their shares of stock. No personal decree was sought against any of these shareholders, save Thayer, and against him only as an original debtor, who had resorted to various devices to defraud his creditors. The main purpose of complainants in both causes was to obtain a personal decree against Thayer for the debts alleged to be due, to hold the assignee liable for the real administration of his trust, and to reach the property which passed into the hands of Thayer, who, it was alleged, was holding it under cover of a sham corporation. To this bill the complainant, Thompson, was made a party defendant. Failing to answer, a decree *pro confesso* was entered against him, and still later, a decree for the full amount of the claims of the various complainants in those causes. It is this decree which the present bill seeks to avoid.

From this recital we think it unnecessary to enter into an argument to show that it is inoperative. The mere comparison of the decree with the pleadings of itself demonstrates that it is *coram non judice*. At this day and on this point it is only necessary to refer to the case of *Bank v. Carpenter*,

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97 Tenn., 437; *Randolph v. Bank, & Lea*, 63; *Rogers v. Breen*, 9 Heis., 679; *Easley v. Tarkington*, 5 Bax., 592.

The decree of the Chancellor, avoiding the decree in question, is affirmed.

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107	455
110	466

STATE v. TAYLOR.

(Jackson. June 24, 1901.)

1. MUNICIPAL CORPORATIONS. *Ownership and control of streets.*

A municipal corporation acquires only an easement in streets dedicated to public use by the acts of the owner in laying them out as part of a town plat, and selling lots abutting on same, and the fee to the lands covered by the streets remains in the original owner and his vendees. (*Post*, pp. 463, 464.)

Cases cited: *Hamilton Co. v. Rape*, 101 Tenn., 225; *Railroad v. Bingham*, 87 Tenn., 530; *Smith v. Railroad*, 87 Tenn., 630.

2. SAME. *Same.*

A municipal corporation holds the public streets, in which it has a mere easement, in trust for the public convenience, and has no authority to sell or transfer same, either for or without consideration, so as to invest its grantee with any interest whatever in the property covered by the streets. It cannot transfer the fee, because it does not own it. It cannot transfer the easement, because it is held in trust for the public use only. A statute authorizing it "to sell and dispose" of the streets, if deemed expedient, applies alone to streets in which the city owns the fee. (*Post*, pp. 463, 464.)

Act construed: Acts 1881, Ch. 167.

Code construed: § 1915 (S.); § 1607 (M. & V.).

Cases cited: *Humes v. Knoxville*, 1 Hum., 403; *Mayor v. Brown*, 9 Heis., 1; *Railroad v. Bingham*, 87 Tenn., 530; *Smith v. Railroad*, 87 Tenn., 630.

3. SAME. *Same.*

But a municipal corporation has the power, under the general law, which has been confirmed by express statute to this corporation, upon its own ideas of utility and expediency, without any power of the Courts to review its action, by ordinance properly passed, not only to open, widen, extend, establish, grade, and pave the public street, but likewise to alter, abolish, vacate, abandon or discontinue the same; and upon

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its abandonment, alteration, or vacation of a street, in which it has only an easement, the fee reverts to the abutting owner. (*Post*, pp. 464-467.)

Act construed: Acts 1881; Ch. 167.

Case cited: *Anderson v. Turbeville*, 6 Cold., 150.

4. SAME. *Same.*

But abandonment, vacation, or alteration must be made subject to the right of abutting owners, or others whose properties are thereby injured, to compensation; but persons only remotely affected by such action have no legal cause of complaint. (*Post*, p. 467.)

FROM OBION.

Appeal in error from Chancery Court of Obion County. JOHN S. COOPER, J.

R. E. MAIDEN, LANNOM & STANFIELD, and J. W. LEWIS for relator.

HAMILTON PARKS and R. P. WHITESELL for Taylor.

CALDWELL, J. This is a bill by the State of Tennessee, on relation of D. W. Beckham, to enjoin G. T. Taylor from erecting a business house on ground alleged to be a part of a public street. The Chancellor granted the relief sought, and the defendant appealed.

In the year 1855, Gen. G. W. Gibbs, owner of the land, laid off and platted a town which he

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called Union City. He sold lots according to his plan on both sides of the numerous streets, including Washington avenue, and in 1867 the town so established, with certain additions, was incorporated by that name. Washington avenue was the broadest of all the streets, being 100 feet wide at every point from one end to the other. It runs east and west, and is intersected by several north and south streets, the easternmost of which is Depot street, and the next, to the westward 120 feet, is First street. Beck & Bransford owned a large part of the block of ground bounded by those two streets, Washington avenue and its first parallel street on the south, some 500 feet distant. They abutted on the south side of Washington avenue 120 feet, the full width of the block, and had other lots southward. From the east and opposite that block, near the middle, Harrison street entered Depot street, and there terminated. Such was the situation for years. In 1884 Harrison street was extended through that block directly west to First street, and the width of Washington avenue, for the distance between Depot street and First street, was diminished in the manner, for the purposes, and upon the considerations disclosed in the following deed, namely:

“*Know All Men by These Presents:* That by virtue of the following ordinance of the Mayor and Aldermen of the corporation of Union City, Tenn., passed December 2, 1884, and the consideration therein expressed, the said Beck & Bransford having

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of this date conveyed to the Mayor and Aldermen of Union City, by their deed, the said right of way for Harrison street to First street, as therein set forth. Said ordinance is as follows:

“COUNCIL ROOM, December 2, 1884.

“Board met in regular session. Present: Mayor Moore, Aldermen Bransford, Deitzel, Ownby, and Shoffner. Minutes read and adopted, etc. On motion and second, the following ordinance was passed and ordered spread on the minutes, viz.:

“*Be it ordained by the Board of Mayor and Aldermen of the Corporation of Union City:* That it is the manifest interest of the corporation that Harrison street be extended west to First street, and Beck & Bransford are the owners of the property through which said street would run, if so extended; and, whereas, that portion of Washington avenue between First street and Depot street is wider than necessary, and Beck & Bransford, are willing to exchange with the said corporation the right of way through their said property for a portion of the said Washington avenue. It is, therefore, ordered by the board that the following described portion of Washington avenue is hereby condemned, set aside, and conveyed to the said Beck & Bransford, to wit: Beginning in the south line of Washington avenue at the intersection of the east line of First street, this point being the northwest corner of Beck & Bransford's furniture factory lot, runs thence north with the east line of First street

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41 feet to a stake; thence east 120 feet to the west line of Depot street; thence south 41 feet to the south line of Washington avenue; thence west 120 feet to the beginning. In consideration of the transfer of the above property to Beck & Bransford, they have agreed and bound themselves to convey to the corporation of Union City, through its Mayor and Aldermen, the above-mentioned right of way for the extension of Harrison street through to First street by the following bounds, to wit: Beginning at the northwest corner of Frank Maney's residence lot; thence north 41 feet; thence east 120 feet to Depot street; thence south with Depot street 41 feet to Maney's northeast corner; thence west 120 feet to the beginning. And it is further ordered by the Board of Mayor and Aldermen that when the said Beck & Bransford shall have executed their deed to the said right of way to the said corporation, that the Mayor and Recorder of this corporation are hereby authorized, empowered, and instructed to make and execute to the said Beck & Bransford a deed in fee to that portion of Washington avenue being set forth and described above, such deed to contain the general covenants and warranty, the right to hold and forever use and dispose of and warrant title, etc.

“Be it further ordained: That this Act take effect from and after its passage of this day and date.

“JOHN BARRY, *Recorder.*

“J. M. MOORE, *Mayor.*

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“Therefore, in compliance with, and in furtherance of, said ordinance, that portion of Washington avenue as set forth and described in said ordinance is hereby conveyed to the said Beck & Bransford, in fee, to them and their heirs and assigns, with covenant of general warranty, that the same is uncumbered, that the right herein exists to so convey, that the quiet and peaceful possession is guaranteed, and that the title to the same be warranted to the said Beck & Bransford, and their heirs and assigns, by the said Mayor and Aldermen of Union City, and their successors in office, against the lawful claims of all persons whatsoever, and we further certify that the foregoing ordinance, as herein set forth, is a true and perfect copy of the original, as shown by the minute book of the said Board of Mayor and Aldermen of Union City, Tenn.

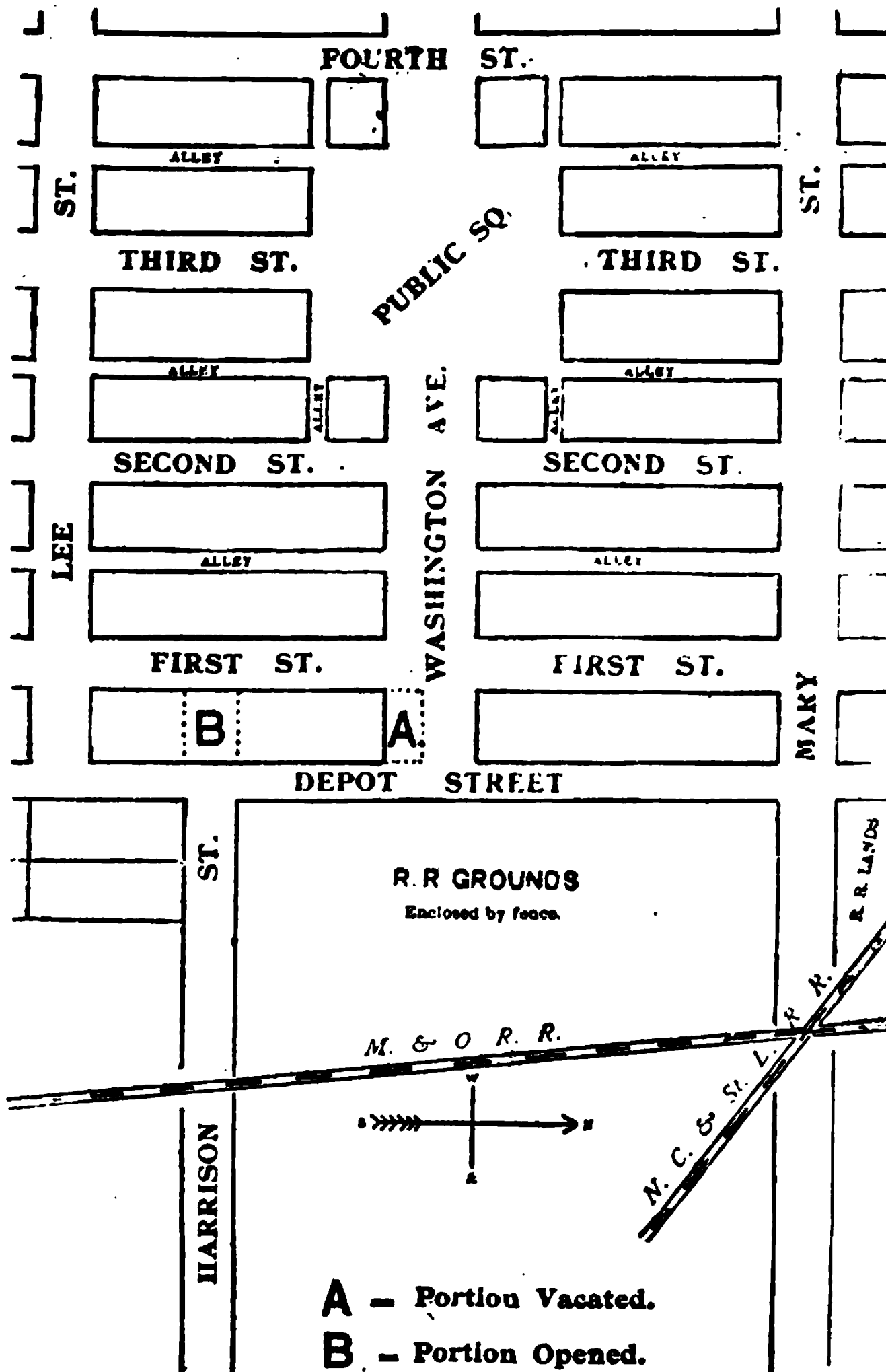
“Witness our signatures, this December 4, 1884.

“J. M. MOORE, *Mayor*.

“JOHN BARRY, *Recorder*.”

The streets as originally laid out, and the changes first referred to, are well illustrated by the appended diagram, in which the extent of the diminution of Washington avenue is represented by the parallelogram inclosing the letter “A,” and the territory taken in exchange for extension of Harrison street is represented by the lines surrounding the letter “B.”

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The Board of Mayor and Aldermen promptly extended Harrison street, as indicated, and since that time the extension has been continuously regarded

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and used as a part of one of the public streets of the town.

Beck and Bransford without delay, erected a large brick building upon that part of Washington avenue conveyed to them, and they and their successors in title, ever afterwards and until this action was commenced in September, 1899, held, used, claimed, and enjoyed the same as their own exclusive property. The defendant, Taylor, is the last vendee. At the time the bill was filed he had about completed the demolition and removal of the old building with a view of replacing it with a new one at once.

The charges on which he has been perpetually enjoined are, in substance and effect, that the ordinance and deed under and by which the Board of Mayor and Aldermen undertook to convey a part of Washington avenue to Beck & Bransford was *ultra vires* and void, and, hence, that neither they nor any of those claiming under or through them acquired any title whatever to that strip of ground that is still a part of a public street, and as such should be protected against the erection of the contemplated building, which could but be an obstruction to public travel upon one of the principal thoroughfares of the town, and, therefore, a nuisance to the entire community.

In a very lengthy answer the defendant controverts those charges, affirms the validity of the assailed ordinance and deed, and also pleads estoppel and abandonment.

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It is obvious, under our law, that the ordinance and deed in question were ineffective to pass title to any portion of Washington avenue to the intended vendees; first because the corporation did not own the fee in the street, and, secondly, because the easement which it did own was not subject to sale and conveyance. The corporation had only the right to use this street for street purposes. That was the extent of the dedication and the board had no authority to exceed its limits. The platting of the territory and sale of the lots by the original owner in the manner heretofore recited vested the streets as such, not otherwise, in the municipality, and at the same time passed to the respective lot purchasers the ultimate fee in the soil to the center of the streets on which they severally abutted. *Hamilton Co. v. Rape*, 101 Tenn., 225; *Railroad v. Bingham*, 87 Tenn., 530; *Smith v. R. R.*, *Ib.*, 630.

By force of its character and the general law the corporation, upon its organization, became endowed with the proprietorship of the streets, which it received in trust as easements for the convenience of the public. *Humes v. Knoxville*, 1 Hum., 403; *Mayor v. Brown*, 9 Heis., 1; *Railroad v. Bingham*, 87 Tenn., 530; *Smith v. Railroad*, *Ib.*, 630.

So, the corporation had only an easement in Washington avenue, and that, from its nature, was incapable of alienation and passage to an individual. Hence, to repeat what has already been remarked,

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the ordinance and deed relied on by the defendant were inoperative as to the fee because the corporation did not own it, and as to the easement because it was not transferable.

It is true the amended charter ,(Acts 1881, Ch. 167, Sec. 1,) and also the general statute, (Shannon's Code, Sec. 1915, Subsec. 8), confer on the Board of Mayor and Aldermen power "to sell and dispose of them (streets and alleys) if deemed expedient," and that the board seems to have deemed this sale expedient; but that power relates alone to such streets and alleys as the corporation may in fact own as so much realty and not to those in which it has a mere easement. Otherwise the provision would be void for repugnancy to Sec. 21 of Art. 1 of the Constitution, in that its effect would be to permit the municipality to take the ultimate fee in the soil from the true owner without compensation and pass it to its vendee.

There is another aspect of the case, however, that is not so favorable to the complainant. Although the corporation's attempted sale and conveyance were unauthorized in law and ineffective, as such, to pass any title from itself to its vendees, its action in that connection was, nevertheless, in legal contemplation, and, in fact, an abandonment of its easement in so much of Washington avenue, and through that abandonment the strip of ground in question ceased to be a part of the public street, and by operation of law reverted to the owner of the ultimate fee.

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By competent terms of the amended charter (Acts 1881, Ch. 167, Sec. 1, Code Union City, p. 5, Sec. 7), the Board of Mayor and Aldermen of the town were clothed with plenary power "to open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve, clean, and repair streets and alleys." In this instance, with all requisite formality, it *extended* Harrison street and *altered* Washington avenue at the same time. The ordinance adopted expresses the judgment of the board with respect to the expediency of both changes and distinctly defines the extent of each, the combined action being based on the twofold proposition "that it is to the manifest interest of the corporation that Harrison street be extended," as stated, and that "Washington avenue, between Depot street and First street, is wider than necessary" by 41 feet. After so reciting the judgment of the board upon the facts, the ordinance continues, "It is, therefore, ordered by the board that the following described portion of Washington avenue is hereby *condemned, set aside*, and conveyed to Beck & Bransford, to wit:" describing the strip of ground here in dispute. That ordinance and the surrender thereunder to Beck & Bransford constituted an abandonment of that portion of the street, and left open as a street, at that point for 120 feet, only the remaining 59 feet of the original width.

The fact that the board deemed Washington avenue, at that point and for that distance, "wider

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than necessary," afforded a sufficient legal reason for making it narrower; and the action of the board, indicated by the other words of the ordinance "condemned" and "set aside" (which in this connection mean the same as *vacated* or *excluded from the future limits of the street*), was within its power, being clearly embraced in each of the charter words "alter" and "abolish."

The board first decided that the particular part of Washington avenue was "wider than necessary," and then vacated and sold the excess. The sale was unauthorized and invalid, the vacation authorized and valid. Payment of a consideration gave no virtue to the unauthorized sale, nor detracted anything from the force of the vacation. The legal effect of vacation is the same with or without compensation; it inevitably terminates the municipal easement and causes a reverter to the owner of the ultimate fee, whoever he may be.

This board had the power to determine for the municipality and the entire public how much of Washington avenue was needed for street purposes and to reject the balance, and the Courts, though feeling as we do that this change greatly impaired the beauty and symmetry of the town, are without jurisdiction to revise its judgment in that matter or to compel it to maintain the street from one extremity to the other at its original width.

Not only did the board presiding in 1884 *condemn and set aside*, or vacate, or reject, or aban-

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don, or discontinue this part of the street as unnecessary for the public use, but no succeeding board seems to have raised a dissent in any form, and the present one is shown to have declined to do so by even the slightest participation in this litigation. The corporation stands by its action, taken more than fifteen years ago, and the suit proceeds with only a private citizen and individual property owner as relator.

Authorities are abundant for the proposition that a municipal corporation, being the State's representative, may ordinarily vacate, discontinue, or abandon its easement in a street or part thereof, whenever by its proper board found to be unnecessary for public use. Dillon Minn. Corp. (4th Ed.), Sec. 666; Elliot Rds. & Sts., (2d Ed.), Sec. 871; Lewis Emi. Dom., Sec. 134; Randolph Emi. Dom., 409; *Anderson v. Turberville*, 6 Cold., 150, 157; 26 L. R. A. 828 note.

But of course this does not mean that the rights of abutting owners affected by the change can be lawfully ignored, for such rights must in each case be reasonably preserved, or compensation paid for the injury done them. Elliott Rds. & Sts., Secs. 877 & 871; Lewis Emi. Dom., Sec. 134 26 L. R. A. 828 note.

The last observation, however, is of small moment to the relator, since his property does not abut on Washington avenue but is situated on other

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streets, Mary and Depot, more than 500 feet away.

Though not technically derainged, the title of Beck & Bransford to the lot abutting on that part of Washington avenue vacated and surrendered to them is assumed throughout the record and not disputed. But, whether they or some one else in fact owned that lot with the ultimate fee to the center of the street, the result of this litigation, so far as the complainant is concerned, must be the same, since that act of the corporation terminated its easement in the vacated part of the avenue, and left it no interest therein to be protected by the Court's decree.

Let the decree below be reversed, the injunction dissolved, and the bill dismissed for the reason that the territory involved was long since vacated, abandoned, and excluded from Washington avenue by the only tribunal having power to determine the requisite width of public streets.

Crisman v. McMurray.

CRISMAN v. McMURRAY.

(*Jackson*. June 24, 1901.)

1. JURY TRIAL. *Issue for, in Chancery Court.*

The statutory provision, in relation to jury trials in the Chancery Courts, that the issues shall "set forth briefly and clearly the true questions of fact to be tried," requires that the questions or propositions submitted for the jury's determination shall be of such character that the decision of each of them will be conclusive upon the merits of the entire case or of some distinct branch of it, and forbids submission to the jury, as distinct and separate issues of collateral, immaterial or subordinate questions of fact, whose decision would be inconclusive as to the merits of the case or any distinct branch of it. (*Post*, pp. 470-472.)

Code construed: § 6285 (S.); § 5213 (M. & V.); § 4468 (T. & S.).

Cases cited: *McElya v. Hill*, 105 Tenn., 319; *Cheatham v. Pearce & Ryan*, 89 Tenn., 670.

2. SAME. *Evidence improperly considered by jury.*

It is reversible error for the jury, even by accident and wholly without fault of themselves, or of the parties or their attorneys, to take out and use during their deliberations the stenographic report of the testimony of one of the parties of a most material character delivered before them orally, not having any such report of the testimony of the other party or of any other witness. (*Post*, pp. 472-474.)

Cases cited: *Railroad v. Lee*, 95 Tenn., 388.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, Ch.

Crisman v. McMurray.

CARROLL & MCKELLAR, for Crisman.

GANTT & PATTERSON and SMITH & TREZEVANT
for McMurray.

CALDWELL, J. This is a suit in equity between partners for a settlement of a co-partnership in buying and selling cotton at Memphis. The complainant sought a large recovery against the defendant and demanded a trial by jury. Giving effect to the verdict, the Chancellor pronounced a decree in favor of the defendant and against the complainant for \$4,143.56. Complainant appealed.

At the threshold of our investigation we encounter an error in practice for which the decree must be reversed. That error consists in the submission and trial of one hundred and ninety-one (191) so-called issues, presenting separately and almost exclusively a mere controversy as to some isolated and in itself inconclusive fact. The proper practice requires that issues submitted to a jury in the Chancery Court should be such as go severally to the decision of the entire case, or some distinct branch thereof, upon its merits. *McElya v. Hill*, 105 Tenn., 319.

The Chancellor, whose action was complained of in *Cheatham v. Pearce & Ryan*, 89 Tenn., 670, had made a rule for the demand of the jury and the formulation of issues for its trial in his Court. One requirement of that rule was that "each issue shall embrace only one question of fact," meaning,

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no doubt, only one decisive or conclusive question of fact, and, in that view, being reasonable and proper. But the propriety of that requirement was not in fact considered by this Court, the assignment of error directed against it being deemed insufficient to raise the question, and being overruled for that reason. 89 Tenn., 683.

Section 4468 of the Code (M. & V., 5218; Shan., 6285), referring to issues for jury trial in the Chancery Court, provides that "the issue shall be made up by the parties under the direction of the Court, and set forth briefly and clearly the true questions of fact to be tried." These concluding words, "the true question of fact to be tried," signifying those controlling questions of fact whose decision will determine the real merits of the controversy, and do not include those of an immaterial, collateral, or inclusive nature. A mere dispute, or a difference between the statements of witnesses on a given point, is not, under the statute, a true question of fact, or a proper subject for a separate issue, unless it is so central and far-reaching that its decision will control the final disposition of the cause as a whole or in some distinct branch. Any number of points in evidence, tending severally to establish a controlling, controverted fact, should be covered by one issue, and not submitted separately in as many different issues. The latter course was largely pursued in this cause. Whether or not

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such controlling fact really exists, is a *true* question of fact and the proper subject of a single issue.

There is another reversible error in the record. Both parties to the litigation testified orally before the jury. By oversight a typewritten copy of the stenographer's notes of the defendant's testimony in chief was at the conclusion of the argument left on the table in the court room, and with the papers properly belonging to the case it improperly went into the hands of the jury, without the knowledge of either litigant, or any of their counsel, or any sinister motive on the part of any one. It was really an accidental occurrence, not realized at the time. The next day one of defendant's counsel learned the fact and in the utmost good faith promptly procured a typewritten copy of the stenographic notes of his client's cross-examination and sent it to the clerk and master to be handed to the jury. This was done to prevent any prejudice that might otherwise result to the complainant from the jury's consideration of the report of the defendant's testimony in chief, without that of his cross-examination. It was a creditable act and unquestionably mitigated the injury that the complainant might have suffered had the counsel been less thoughtful. However the evil consequences of the jury's reception and consideration of the report of the examination in chief was not entirely cured by the mitigating tendency of the report of the cross-examination. Besides no part of the report of either

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was legal evidence, there being no provision of law or agreement of parties making it so. Therefore no part of either could properly be considered by the jury. The witness had delivered his evidence orally and the jury was authorized to consider it in no other form. Not only was the written report of the defendant's testimony illegal as evidence, because not authorized by law or agreement to be so used, but the accident, as it may well be termed, by which that part of it covering the examination in chief reached the jury seems really to have been prejudicial to the complainant whose testimony rested alone in the memory of the jury. The majority of the jurors stated after the verdict that during their prolonged deliberation upon the many close and difficult questions submitted to them, they had frequent recourse to that paper as the best and most satisfactory means of ascertaining exactly what the defendant had said in reference to such of those questions as were so close that they could not easily reach a conclusion otherwise. In short, the jurors regarding this paper as a part of the evidence in the case naturally used it freely, and especially upon matters of account involving many figures not so easily carried in the mind from oral testimony, they quite as naturally, though it may be unintentionally, gave it more probative force than their recollection of what the complainant had orally said about the same matter.

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In any view to be fairly taken of the facts recited it seems clear that without the fault of any one the defendant has had, unsought, advantage of the complainant before the jury.

As an ancient invocation of the time-honored rule that both adverse litigants are entitled to the like impartial hearing, learned counsel for the complainant quote one of the early sentences of Demosthenes on the Crown as follows; "I pray, likewise, and this specially concerns yourselves, your religion and your honor, that the gods may put it in your minds not to take counsel of my opponent touching the manner in which I am to be heard. That would indeed be cruel. But of the laws and of your oath, wherein, (besides the other obligation) it is prescribed that you should hear both sides alike."

Authorities are abundant for the proposition that the consideration of a material paper not introduced in evidence, but being submitted to the jury by accident, as in this instance, is ground for reversal. Some of them are, *Whitney v. Whitmore*, 5 Mass., 405; Thompson and Merriam on Juries, Sec. 386: *Railroad v. Lee*, 95 Tenn., 388.

In the last case this Court said :

"It was error, also, for the jury to examine and consider diagrams not introduced in the evidence." 95 Tenn., 390.

For the reasons stated the decree is reversed and the cause is remanded for a new trial.

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The record presents a case peculiarly suited for an account before the Master, but the complainant is entitled to another trial before a jury if he desires it.

In the latter event issues will be made up under the rule announced herein.

Since both parties are equally responsible for the multiplicity of the issues heretofore submitted, and equally blameless for the accidental reception of the authorized report of the defendant's testimony in chief, each of them will pay one half of the costs of the appeal.

Bank v. Smith.

BANK v. SMITH.

(*Jackson.* June 24, 1901.)

1. **MORTGAGES AND DEEDS OF TRUST.** *Assignment of secured notes passes lien.*

Doctrine reaffirmed that the lien of a mortgage or deed of trust passes, without special assignment thereof, to the indorsee or transferee of the note or debt secured. (*Post*, p. 483.)

Cases cited: *Clark v. Jones*, 93 Tenn., 639.

2. **SAME.** *If barred, sale under void.*

A sale made by the trustee under and pursuant to a deed of trust, after its lien is barred by the statute of ten years, is absolutely void and imparts no title to the purchaser. (*Post*, p. 483.)

3. **SAME.** *Not saved from bar by renewal, when.*

A mortgage or deed of trust cannot be saved from the bar of the statute of ten years and its lien preserved as against subsequent intermediate incumbrances, by any sort of new promise or renewal contract between the maker and beneficiary, though entered into before the bar of the statute had attached. After the lapse of ten years from the date of the maturity of the secured debt the bar of the statute, if not prevented by appropriate proceedings for foreclosure, becomes complete and absolute. (*Post*, pp. 483, 484.)

Act construed: Acts 1885, Ch. 9.

Code construed: § 4464 (S.).

Cases cited; *McElwee v. McElwee*, 97 Tenn., 649; *Runnells v. Jacobs*, 100 Tenn., 397.

4. **SAME.** *Extinguished pro tanto.*

The assignee of a debt secured by a mortgage having priority, who takes the assignment merely as security for money advanced at the instance and for the benefit of the maker, or of a volunteer named by him, cannot, as against a subsequent lienor, enforce the mortgage for a larger amount than was actually advanced, with interest. (*Post* p. 484.)

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5. COLLATERAL SECURITY. *Effect of payment of debt.*

The payment or cancelation of the principal debt *ipso facto* terminates the creditor's interest in collaterals deposited for its security. (*Post*, pp. 484, 485.)

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FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, Ch.

METCALF & METCALF and TURLEY & TURLEY for
Bank.

McFARLAND & NEBLETT and W. W. GOODWIN,
W. A. COLLIER, and MALONE & MALONE for Smith.

CALDWELL, J. On July 27, 1886, W. A. Collier and Alice T. Collier, his wife, executed a deed of trust on 203 acres of land, near the city of Memphis, to William M. Smith and John P. Houston, trustees, to secure an indebtedness of \$7,513.10 to Henry T. Ellett. That indebtedness was evidenced by the promissory note of Collier and wife, maturing September 30, 1886, and the conveyance was promptly registered.

November 2, 1892, the same grantors executed another deed of trust on the same land to Smith & Guion, trustees, with the view of securing to the Union & Planters' Bank a large indebtedness, con-

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sisting of three notes for \$5,500 each, and two other notes aggregating about \$5,000. One of the three \$5,500 notes was indorsed by John P. McCallum, one by Joseph Haines, and the other by Casey Young. This instrument was registered likewise.

Henry T. Ellett died and his widow became the owner of his note and security. She was about to have the first deed of trust foreclosed, when, on June 29, 1894, Collier and wife induced Mrs. Fannie A. Wheeless, a widow, to purchase the debt and lien of Mrs. Ellett, and grant further indulgence. Besides the transfer by Mrs. Ellett of her note and security, Mrs. Wheeless, on the day last mentioned, received from Collier and wife a written instrument reciting the facts of the transaction, acknowledging Mrs. Wheeless as their creditor and as the beneficiary under the first deed of trust, providing that the land "shall stand as security" to her "to the same extent and effect as originally intended for the said note" to Henry T. Ellett, stipulating for one year's additional indulgence, agreeing to pay reasonable attorney's fees for the necessary protection or enforcement of her rights, binding Mrs. Collier's separate estate secondarily, etc.

On February 21, 1895, John F. McCallum, "in payment of the (\$5,500) note indorsed by him," executed to the bank his individual note for \$5,714.15, pledging the note so paid as collateral for the note so executed. At the same time Joseph Haines and Casey Young each took precisely the same course with

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the other two \$5,500 notes, indorsed by them respectively, and thereafter the bank held the six notes. Mrs. Wheeless, in fact, indulged her debtors until February 14, 1898, when the trustees, at her instance, sold the land under the first deed of trust, and she, being the highest bidder, became the purchaser, at the price of \$9,000, about the amount of her debt.

On that day the Union and Planters' Bank, the beneficiary under the second deed of trust, filed the original bill in this cause, to prevent the sale and to foreclose the second deed of trust for its own benefit. The injunction was too late to arrest the sale, but it was in time to restrain the execution of the deed. By consent, however, the deed was afterwards delivered, subject to the final decree to be made in the cause.

The theory of the bank's bill is that the first deed of trust was barred and its lien extinguished absolutely by the ten years' statute of limitations (Acts 1885, Ch. 9), and that, as a consequence, the second deed of trust became operative as a prior charge on the land in favor of the bank as beneficiary. Mrs. Wheeless, by answer, denied the bank's contention as to the law of the case *in toto*, and, by cross bill, asserted priority in herself as owner of the Ellett debt and deed of trust, and by virtue of the instrument executed to her by Collier and wife at the time she became such owner.

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Thereafter, with a view of diminishing or ending this litigation, W. A. Collier undertook an adjustment of all the debts mentioned in the second deed.

The time was opportune, for his indorsers had sued the bank for large amounts of usury asking that they be credited on those debts or some of them, and there may have existed some other claim of equities in his favor. The bank agreed to satisfy or transfer all of those debts, which with interest to that time aggregated nearly six times as much, for \$5,000.

This latter sum, Mr. C. W. Metcalf, a distinguished lawyer and personal friend of W. A. Collier, was ready to furnish for the purpose indicated; but, as he was unwilling to make the advance to Collier himself, the latter's son, Thos. B. Collier, a young gentleman then in college was requested to take the matter up in his own name. He agreed to do so, but being without money, Mr. Metcalf furnished him the \$5,000 for the bank, and it executed a written transfer of those several debts. This instrument, however, through a misunderstanding on the part of the bank's attorney, named C. W. Metcalf instead of Thos. B. Collier as transferee, when in fact it was intended by them that the legal title to the notes should be vested in the latter of these gentlemen, and that the former should hold them only as collateral security; but rather than have the instrument reformed they agreed be-

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tween themselves that Metcalf should hold the legal title thereby transferred to him, first as security for the \$5,000 he had advanced and then as trustee for Thos. B. Collier.

Subsequently they, by appropriate pleadings and orders, became parties to this cause, and it proceeded thenceforth with them as complainants, in the right of the bank and in its room and stead. Mrs. Wheeless, by amended cross bill, attacked the bank's transfer, charging that the transaction was, in reality, a purchase of his own debts by W. A. Collier, and, therefore, a complete satisfaction of them and an extinguishment of the bank's deed of trust. This charge was denied.

After the bank's transfer to Metcalf, he, by direction of Thomas B. Collier, surrendered to John P. McCallum and to Joseph Haines, respectively, without payment, their respective individual notes for \$5,714.15 each, but retained, as supposed living obligations, the two original \$5,500 notes which they, as indorsers, had taken up from the bank and deposited with it as security for those individual notes.

Hearing the case finally on all of the pleadings and full proof, the Chancellor adjudged, in effect, that the first, or Ellett, deed of trust was barred and extinguished by the ten years' statute, invoked by the bank and its successors in interest, and, therefore, that the sale thereunder by the trustees therein, and their deed to Mrs. Wheeless, as purchaser, were void; that the second, or the bank's,

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deed of trust was effective as a prior charge on the land in favor of Thomas B. Collier, as owner of the bank's debts; that the instrument executed by W. A. Collier and wife to Mrs. Wheeless, at the time she purchased the Ellett note, gave her only an interest in the land, subordinate to that of the bank under its deed of trust, created a charge on Mrs. Collier's separate estate for that note, and bound that estate and W. A. Collier for the payment of any reasonable attorney's fee incurred by Mrs. Wheeless in the matter. Thereupon, the Court ordered that the 203 acres of land be sold, and that the proceeds be applied, primarily, in payment of Thomas B. Collier's debts, aggregating \$31,315.37 (the first \$5,687.50 thereof to be paid to C. W. Metcalf in satisfaction of his loan), and, secondarily, in payment of the debt of Mrs. Wheeless for \$10,990. It was also ordered that certain parts of the separate estate of Mrs. Collier be thereafter sold, if necessary, to pay any unpaid balance due to Mrs. Wheeless, and that W. A. Collier and wife pay \$1,000 as a fee to the counsel of Mrs. Wheeless. Collier and wife and Mrs. Wheeless took special appeals from certain parts of the decree that were adverse to their respective interests.

We will not discuss or formally state the several assignments of error, but will content ourselves with a brief statement of our conclusions on a few controlling questions.

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1. It is well settled in this State that the lien of a deed of trust passes, without special assignment thereof, to the indorsee or transferee of the note or debt secured. *Clark v. Jones*, 93 Tenn., 638.

2. The lien of the first, or Ellett deed of trust, was "barred" and "discharged" by the lapse of more than ten years between the maturity of the secured note and the sale by the trustees. Acts 1885, Ch. 9, Sec. 1; Shan., 4464; *McElwee v. McElwee*, 97 Tenn., 649; *Runnels v. Jacobs*, 100 Tenn., 397. Hence that sale and the deed by the trustees passed no title. It matters not that W. A. Collier and wife may have intended the paper executed by them to Mrs. Wheless as a renewal of the Ellett deed of trust, and that she may have so understood it, for no language that could have been employed would have extended the life of that deed of trust, especially as against intermediate lienors, beyond the period of ten years from the maturity of the Ellett note. The statute is plain, positive, and unyielding on this point.

3. That paper, though dependent for a description of the land upon the Ellett deed of trust, was in law effective as a new conveyance, from its date and delivery as to the makers, and from its registration, the day after the commencement of this suit, as to all other persons. Mrs. Wheless, as the owner of the Ellett note, might have foreclosed the Ellett deed of trust by a sale of the land at any

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time within ten years, but by failing to do that she lost her priority and was left to stand alone upon the conveyance to herself, which, being subsequent in point of time, was subordinate in right to the bank's deed of trust.

4. That deed of trust, however, has been preserved, as against the conveyance of the same property to Mrs. Wheless, only to the extent of \$5,000 actually paid through Mr. Metcalf for the bank's debts. Thomas B. Collier's purchase of those debts under the circumstances mentioned was, as against that conveyance, of which he had full notice, a satisfaction of the bank's deed of trust except as to the amount paid, his purchase, as against Mrs. Wheless, being tantamount to a like purchase (with legal title to Mr. Metcalf as security) by his father, who owed the debts, arranged the details, and brought him into the transaction. No one in such relation and with such notice, making such a purchase, under such circumstances, will, in equity, be allowed priority beyond the amount of the outlay actually made, with interest.

5. Mr. Metcalf, who advanced the \$5,000 and received the transfer in the manner heretofore recited, is entitled in his own right, or through Thomas B. Collier, to have the bank's deed of trust foreclosed for his reimbursement, and that is the full extent to which the priority of that instrument has been preserved as against the conveyance to Mrs. Wheless.

6. As against W. A. Collier, the debtor, who

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induced his son to purchase the bank's debts, it may be conceded that the son thereby became entitled to claim the whole of that indebtedness and to foreclose the bank's deed of trust for its payment; nevertheless, the voluntary surrender by Thos. B. Collier, the son, of the two individual notes of McCallum and Haines for \$5,714.15 each operated as a release to them of the two original notes for \$5,500.00 each, deposited as collateral security therefor, and to that extent, even as against his father, decreased the indebtedness he had purchased from the bank and his lien under the bank's deed of trust. The payment or cancellation of the principal debt *ipso facto* terminates the creditor's interest in the collateral.

7. The fee allowed to the attorney of Mrs. Wheeless is justified by the proof.

Modify decree of Court below and enter one here in accord with this opinion.

Judge Beard dissents from the fourth paragraph of the Court's conclusions, but concurs otherwise. Judge McAlister being disqualified by relationship did not sit at the hearing or participate in the decision.

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GLASSCOCK v. TATE.

*(Jackson. June 24, 1901.)*1. WILL. *Creates active trust.*

A will creates an active trust and invests the trustee with legal title for the purposes of the trust, including the power to maintain suit for protection of the trust estate, which, after devising testatrix's realty to her two sons during their lives, with remainder upon their death to their children, who should live to attain majority, and in default of such children, to a charitable use, provides for appointment of a trustee to rent out the lands, and pay taxes, and distribute the residue of the rents between her two sons. (*Post*, pp. 487-492.)

Cases cited: *Jourolmon v. Massengill*, 86 Tenn., 82; *Jobe v. Dillard*, 104 Tenn., 658.

2. SAME. *Proper construction of.*

Under such will the testatrix's two sons do not take as joint tenants, with right of survivorship, but they take several interests as tenants in common. Upon the death of one son, leaving a minor child, the trustee holds the estate equally for such child and the surviving son, until the child attains its majority, when he is invested with the full legal title to one-half of the estate, and the trust continues to the surviving son only. Should the child die before attaining majority, his one-half of the estate goes, not to the surviving son of testatrix, but to the designated charitable use. So the interest of a son who dies leaving no child goes to said charitable use. (*Post*, pp. 491-498.)

Cases cited: *Smith v. Metcalf*, 1 Head, 64; *Smith v. Thompson*, 2 Swan, 385.

3. SAME. *Same.*

Notwithstanding the devise in this will is to the two sons "during *their* lives," with remainder to "the heirs of *their* body," to take effect "at *their* death," the Court finds, in the relation of the parties, and in the general tenor of this will, such indications, which by law need only be slight, as justifies

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the construction that testatrix intended her sons to take several and distributable interests, which, upon the death of each son, was cast upon his children. (*Post*, pp. 491-498.)

4. DECREE. *Invalid, when.*

A decree is invalid, for want of power in the Court to render it, which undertakes, even with the consent of the beneficiary, especially when he is an infant, to set aside a trust created by will for his benefit, and denude the trustee of his estate and powers. Courts will preserve, but never destroy a trust of this character. (*Post*, p. 492.)

5. SAME. *Same.*

A decree for partition of land is invalid where the holder of the legal title and contingent remaindermen were not made parties to the case in which it was rendered. (*Post*, p. 498.)

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, Ch.

CARROLL, MCKELLAR & BULLINGTON for Glasscock.

FINLAY & FINLAY, L. T. M. CANADA, and J. J. DUBOSE for Tate.

CALDWELL, J. On October 19, 1873, Lucy A. Tate, a widow, died testate at her residence in Memphis, Tenn. Her will, which was duly probated in September, 1874, is in the following language, namely:

“TUESDAY, June 27, 1871.

“I, Lucy A. Tate, of the county of Shelby and State of Tennessee, and city of Memphis, being of

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sound mind and memory, and considering the uncertainty of this frail, transitory life, do, therefore, make, ordain, publish, and declare this to be my last will and testament. That is to say: First, after all my lawful debts are paid and discharged, the residue of my real estate I loan to my two sons, Jesse M. Tate and Bowden G. Tate, during their natural lives. I desire a trustee appointed, and the places rented out, and, after the taxes are paid, the remainder, whatever it may be, divided equally between my two sons. My estate consists of eight and a half acres, more or less, known as my home place, on the north side of Tate street, between Orleans and McKinley streets, and at their death then to go to the heirs of their body—if said heirs should live to be of age—and said children must be of lawful marriage. If my two sons should have no such heirs as I have mentioned, I then will and devise the above described home place to the Cumberland Presbyterian University at Lebanon, Tenn., the same to be sold or kept as the said trustees of said university shall think best. And I further order that this devise be used as a fund for the education of young men in the said university studying for the ministry of said church, and for none other. This is my will, and I leave it all in the hands of God, to do with it as he in his infinite wisdom may direct. Amen. LUCY A. TATE."

Jesse H. Tate, one of the two sons of the testatrix, died in the month of September, 1878, leaving

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one child, Jesse M. Tate, Jr., an infant son. In the following December a bill was filed in the Chancery Court of Shelby County by Bowden G. Tate, the other son of the testatrix, against Jesse M. Tate, Jr., to have her will construed and secure the appointment of a trustee thereunder. The Chancellor, apparently by consent, adjudged that Jesse M. Tate, Jr., took an undivided one-half of the devised realty in fee on the death of his father, Jesse M. Tate. H. L. Guion was appointed to execute the trusts of the will, and, upon his death, E. B. LeMaster was appointed in his room and stead; and, upon the latter's resignation, George H. Glasscock became his successor and is the present trustee. After attaining his majority, Jesse M. Tate, Jr., in January, 1898, filed a bill in the Probate Court of Shelby County against Bowden G. Tate, his wife, Nannie H. Tate, and his only child, Lucy A. Tate, a minor, to have the devised real estate partitioned in kind. That relief was granted by that Court, and thereafter Jesse M. Tate, Jr., sold to third parties certain of the lots assigned to him.

Subsequently, in the year 1900, Glasscock, the trustee, filed the original and amended bills in the present cause against Bowden G. Tate, his wife and daughter (then seventeen years of age), Jesse M. Tate and his wife and vendee, to vacate and annul the decree construing the will, for the alleged reason that it "appears to have been a consent construction," when, in reality, as alleged, Bowden G. Tate

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had neither the mental nor the legal power to bind himself to such a result by such means, and the Court was without jurisdiction to make such decree, and also to vacate and annul the partition decree, because, as alleged, the trustee was not a party thereto; and further, because, as charged, the nature of the trusts of the will was such that the estate could not be partitioned during the lifetime of Bowden G. Tate, and especially not by the Probate Court, which has only limited statutory jurisdiction. The trustee seeks additionally to obtain a construction of the will and direction as to his duties thereunder, and to this end he alleges that "he is advised that the true construction of the will gives to the defendant, Bowden G. Tate, after the death of his brother, the entire net income (of the devise), and that the trustee, when appointed, took the legal title to the real estate until the death of both the life tenants and also until the children of both life tenants attain the age of twenty-one years; and that the estate which the testatrix carved out was an equitable estate for the lives of her two sons and an equitable estate to the survivor of them, with a vested remainder" to their children, subject to be divested, upon condition that the younger of them should die before reaching the age of twenty-one years; and that it was, therefore, the duty of the trustee to divide the net income of the trust estate equally between the two sons of the testatrix so long as they both lived; and after the death of

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Jesse M., to pay the whole of it to Bowden G. during his life.

Jesse M. Tate and other defendants severally demurred to these bills and assigned, substantially, the same grounds, which, briefly stated, are: (1) That the complainant has no title under the will, but is only an agent; (2) that the decree construing the will binds all interested parties; (3) that whether that decree be *res adjudicata* or not, the construction it placed on the will is the correct one; (4) that the Probate Court had plenary jurisdiction to partition the property. The demurrers being sustained and the bills dismissed, the complainant was allowed an appeal.

It is entirely clear that the testatrix intended each of her two sons to have one-half of the net income of the devised property during his life, and that he should receive this from the contemplated trustee, to whom she gave dominion and control of the property for that purpose. Though her sons are the first and principal objects of her bounty, the testatrix makes them less than legal owners, and, though the trustee is not a beneficiary at all, she makes him more than a mere agent. By the words, "The residue of my real estate I loan to my two sons . . . during their natural lives," and, "I desire a trustee appointed and the places rented out, and, after the taxes are paid, the remainder, whatever it may be, divided equally between my two sons," she devolved upon the trustee the duty of letting the

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property, keeping it in repair, collecting the rents, paying the taxes, and dividing the net income equally between the two sons. The trust thus created was an active one. The legal title was conferred upon the trustee for the purpose of the trust, and only equitable life estates were vested in the sons. 1 Perry on Trusts, Sec. 307; *Jourolmon v. Massengill*, 86 Tenn., 82; *Jobe v. Dillard*, 104 Tenn., 658. See 88 Tenn., 786.

Such a trust being valid in the first instance, as this one undoubtedly was, could not, while yet alive and capable of execution, be terminated, nor the trustee, without cause, denuded of his title and powers, or any part thereof, by the decree of any court. The jurisdiction of a court of equity is always available for the conservation of a trust like this one, but never for its destruction. *Cuthbert v. Channet*, 18 L. R. A. (N. Y.), 745, and note; *Gerard v. Buckley*, 137 Mass., 475; *Outcalt v. Appleby*, 36 N. J. Eq., 75.

The consent of Bowden G. Tate made the decree purporting to construe the will neither better nor worse, so far at least as the title and powers of the trustee were concerned. This is true, for the twofold reason that he, as alleged, was mentally incapable of consenting, and, besides, that the trust was such that it could not be changed by the mere consent of a single beneficiary.

A trustee takes an estate exactly co-extensive with the duties to be performed by him, or just

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such an interest as the purposes of the trust require, and that estate or interest, ordinarily, ceases only when those duties have been discharged or those purposes accomplished. *Smith v. Metcalf*, 1 Head, 64; *Smith v. Thompson*, 1 Swan, 385; *Roarty v. Smith*, 53 N. J. Ev., 257.

The proposition of the trustee is that this trust, since the death of Jesse M. Tate, as before, embraces the whole of the devised property, and that since that event Bowden G. Tate has been and is entitled to the whole of the net income during his natural life. The adverse contention is that the death of Jesse M. Tate terminated the trust, if not entirely, at least to the extent of one undivided half of the property previously embraced, and that the fee simple title of that half, with the right of present possession, passed at once to his son, Jesse M. Tate, Jr., subject alone to the contingency of his death before becoming of age. To the latter effect, in the main, was the consent construction now assailed for invalidity.

Both views are partially correct, neither of them entirely so. Though the "two sons" are always mentioned collectively, and the benefaction is to them equally "during their natural lives," the testatrix, knowing that in the course of nature they would hardly die in the same month or year, evidently intended to provide for each of them separately during his own life and not for both of them jointly during their joint lives; and, as the bounty

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so provided must come through the hands of the trustee alone, the trust, at least as to one-half the property, must inevitably continue to the end of the life of the longer liver. The "two sons" are not made joint tenants, but tenants in common. There is no express or implied provision for survivorship between them; no indication of a desire on the part of the testatrix that either of them should ever, in any event, have more than his original one-half of the net income of the devised realty. Hence the share or interest of Bowden G. Tate has been and is the same since the decease of his brother as it was before.

Strictly interpreted, the collective words, "at their death," would refer to the first point of time when both of the sons shall be deceased, and would make the date of the death of the longer liver the time for the whole property "to go to the heirs of their body," etc., *per capita*; but on slight indication of a contrary intention, the same words are construed distributively, and the respective remaindermen let in *per stripes* from the death of each separate life tenant. This latter construction is especially appropriate when the respective life tenants and the remaindermen sustain the relation of parent and child, as in this instance. 2 Jarman on Wills (R. & T.), 758; *Willes v. Douglas*, 10 Beav., 47; *Anow v. Mellish*, 1 De. Get. & Smale, 355; *Loving v. Collidge*, 99 Mass., 192.

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The fact that the first gifts ever made by this will are to the children of the life tenant, in and of itself, indicates, as does also the general scheme of the devise, that the testatrix intended the devised property or its income to pass *pro tanto* and at once *per stripes* at the death of either and of each life tenant, and not *in solido* and *per capita* at the decease of the longer liver.

The words, "at the death," used in like connection, were given a contrary construction in *Loring v. Coolidge, supra*, but that was done, in part at least, because the beneficiaries under the will there considered did not sustain the relation of parent and child to each other—a fact, which alone is sufficient to differentiate that case from this one. It was also ruled in that case that on the death of one of the *cestui que trust* the survivor became entitled to the whole income for life, because there was "no other party to claim an interest in the income, as income, and no apparent intent that the principal should be broken, or the trust in part terminated, until the death of both of the beneficiaries for life. 99 Mass., 193.

There is a difference between the two cases on this point also. In the first place, the general tenor of this will impresses the Court that the testatrix intended to limit the benefaction of each of her sons, in any and every event, to that expressly made for him; and, in the next place, the provision that the devised property shall, at the death of

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the life tenants, "go to the heirs of their body, if said heirs shall live to be of age," when applied to the events actually transpiring, was evidently intended to pass one-half of the net income, after the death of Jesse M. Tate, to his son, Jesse M. Tate, Jr., until he attained his majority. Had he died before that time, the fee simple title to an undivided one-half interest in the land, with the present right of possession, would have passed, under the last clause of the will, to the trustees of Cumberland University, but, when he reached the age of twenty-one years, the contingent interest in that half became extinct and his defeasible title thereto became absolute. So long as he was a minor and his title was defeasible by his death, the trust continued as to the whole of the land, for the equal benefit of his uncle and himself, after and notwithstanding the death of his father, one of the original beneficiaries. However, when he became of age and his title to one-half of the land, thereby and in virtue of the terms of the will, became absolute, the trust was, by operation of law, cut down and terminated *pro tanto*.

There is no express direction in the will, either that the trust shall survive *in solido* or that it shall cease *pro tanto* after the death of one of the life beneficiaries; but the fact that the child of such deceased *cestui que trust* is given only a defeasible interest during minority and an absolute estate after majority, justifies the inference that the testatrix intended the trust, which must continue for her sur-

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viving son, to continue, also, for the benefit of the child of her deceased son while yet a minor, and that it should terminate as to him when his title to the *corpus* became absolute. Continuation of the trust as a whole is in harmony with his interest while yet defeasible, but entirely inconsistent with the absolute ownership subsequently accruing. Similar reasoning, in part, was applied and a similar result, in part, was attained in the case of *Roarty v. Smith*, 53 N. J. Eq., 257.

After considering the different provisions of the will, in connection with and as applicable to the facts alleged, we conclude: (1) That the legal title to the devised property was vested in the trustee for the purposes of the trust; (2) that Jesse M. Tate and Bowden G. Tate the sons of the testatrix, each took a separate, non-surviving, equitable life interest to the extent of one-half the net income of the trust estate; (3) that the son, and only child, of Jesse M., and daughter, and only child, of Bowden G. each took a remainder in fee, *per stripes*, with limitation over to the trustees of Cumberland University as to each in case of death during minority; (4) that, notwithstanding the death of Jesse M. Tate, Sr., the trust continued *in solido* until Jesse M., his son, attained his majority, and then ceased *pro tanto*, he being entitled, after the death of his father and during his minority, to one-half of the net income, and, after his majority, to one-half the devised property in fee absolute; (5) that

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the trust still continues *pro tanto* for the benefit of Bowden G. Tate, the surviving son of the testatrix, and will so continue during his life; (6) that the decree placing a consent construction on the will may be set aside because Bowden G. Tate was without capacity to approve, and the Court equally without power to adjudge, an abridgment of the trust; (7) that the partition decree is inoperative, because neither the trustee, in whom the legal title to one-half the property must remain during the life of Bowden G. Tate, nor Cumberland University, which still has a contingent interest in the same half, was before the Court.

Bowden G. Tate filed a cross bill in the present case, seeking practically the same relief as that sought in the original and amended bills, and asking, additionally, for an account with the trustee and his predecessor. Demurrers like those already stated were filed against the cross bill, and in like manner they were sustained and the complainant allowed an appeal.

For the reasons stated the decrees are reversed, the demurrers to original, amended, and cross bills overruled, and the cause remanded for further proceedings.

Decree overruling demurrer to that part of cross bill seeking an account is affirmed.

State v. Cook.

STATE v. COOK.

*(Jackson. June 24, 1901.)*1. PATENT RIGHTS. *State's regulation of sale constitutional.*

State legislation denying the privileges of negotiability to notes showing on their face that they were given for a patent right, and denouncing and punishing as a felony the taking of a note for a patent right, or any interest therein, without stating on its face that it was given upon such consideration, is not in contravention of that clause of the Federal Constitution which declares that "the Congress shall have power to promote the progress of science and useful arts by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries." Such legislation constitutes a legitimate exercise of police power, and limits, not the proper use, of property in patent rights, but its abuse.

Constitution construed: U. S. Const., Art. 1, Sec. 8, Subsec., 8.

Acts construed: Acts 1897, Ch. 77; Acts 1879, Ch. 228.

Code construed: § 3216 (S.); § 2481 (M. & V.).

Cases cited: *Harmon v. Haggerty*, 88 Tenn., 705; *Bank v. Stockell*, 92 Tenn., 252; *State v. Scott*, 98 Tenn., 254; *Tennessee v. Butler*, 3 Lea, 222; *Harbison v. Knoxville Iron Co.*, 103 Tenn., 439.

2. CLASS LEGISLATION. *Not vicious, when.*

A statute which denounces and punishes as felony the taking of notes for patent rights without explicitly stating that fact on the face of the note, is not vicious class legislation, although no such provision is made as to the taking of notes upon any other consideration. The classification upon which such statute is based is not capricious, but founded on good and sufficient reasons.

Constitution construed: Art. 2, Sec. 8.

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Acts construed: Acts 1897, Ch. 77.

Case cited: *State v. Schlitz Brewing Co.*, 104 Tenn., 731, 732.

FROM HENDERSON.

Appeal from Circuit Court of Henderson County.
LEVI S. WOODS, J.

ATTORNEY-GENERAL PICKLE AND BORHAM for the
State.

Ross & Ross for Cook.

CALDWELL, J. In March, 1901, N. T. Cook was indicted in the Circuit Court of Henderson County for violating Sec. 1 of Ch. 77, of the Acts of 1897, in that he, in his own behalf, as charged in one count, and in the representative capacity as secretary of B. D. Keeton & Co., as charged in another count, on November 2, 1900, took and received the promissory note of W. J. Reddin for \$75, as part consideration for a territorial interest in a certain patent for a boring and mortising machine, without having the note show clearly on its face that it was given for an interest in a patent right. The indictment was quashed on the ground that the enactment on which it was based is void, for repugnancy to that provision of the Federal Constitution relating to patents, and the State ap-

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pealed in error. The statute in question is as follows:

“SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That hereafter it shall be unlawful for any person, either in his own behalf or in a representative capacity, to take or receive for the sale of a patent right, or any interest therein, a note or other written security, given for such right or any interest therein, unless it shall clearly appear upon the face of the note or other security that the same is given in the purchase of a patent right or an interest therein.

“SEC. 2. *Be it further enacted*, That every person violating the first section of this Act shall be deemed guilty of a felony, and upon conviction thereof shall be punished for each offense by imprisonment in the penitentiary not less than one year nor more than five years.” Acts 1897, Ch. 77.

That part of the Federal Constitution supposed to have been violated by that Act provides that “the Congress shall have power to promote the progress of science and useful arts by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries.” U. S. Con., Art 1, Sec. 8, Subsec. 8.

As expressly stated therein, the object of that provision is to promote the progress of science and useful arts in the United States, and that object is to be accomplished by congressional legislation, which shall secure to authors and inventors, for limited

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times, the *exclusive right* to their respective writings and discoveries in every State. Congress has passed numerous Acts with that end in view. Some of the most important of them are incorporated in the Revised Statutes of the United States at Section 4883 *et seq.* They prescribe the mode of obtaining letters patent, and secure to patentees the exclusive right to their respective patents.

“The exclusive right” referred to in the organic law, and secured by the statute, is the equivalent of *exclusive ownership*, and ownership includes the power to sell. The right of sale is an inherent and essential part of unlimited ownership; it is one of the most important elements of property. 169 U. S., *Holden v. Hardy*, 391; *Harbison v. Knoxville Iron Co.*, 103 Tenn., 439. Moreover, Sec. 4898 of the Revised Statutes expressly authorizes every patentee to assign his patent or any interest therein, by proper written instrument, and gives his assignee the same authority.

The essence of the objection urged by the defendant against the State legislation, under which he stands indicted, is that it, as he contends, violates the Constitution of the United States in that it restricts and impairs his right to sell his patent or any interest therein. Though a great deal may be and has been said in support of that objection, this Court does not think it tenable. The Act assailed was not intended to have, and, in fact, it does not, have the effect ascribed to it by the defendant. It

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does not really restrict or impair the right of the true owner to legally sell any patent or interest therein. Since the passage of the Act, as before, every patentee and every assignee of a patent, or interest therein, may, without let or hindrance on the part of the State, make as many sales as he can find purchasers, and at such prices and on such terms as the contracting parties may agree upon. No burden is placed on the seller, no restraint on the purchaser. The object is not to restrict or impair the right of sale in any degree, but only to protect purchasers in some measure against the deceptive and fraudulent exercise of that right.

The Legislature for more than twenty years has regarded such protection expedient for the general welfare of the State, and, to secure it, has passed two Acts. The first one, Ch. 228 of the Acts of 1879, provides that "a note or other written security given in this State in the purchase of a patent right, or any interest therein, shall be subject, in the hands of any holder or assignee, to all equitable defenses to which it was subject in the hands of the original payee, when the fact that it was given in such purchases appears on its face." Code, M. & V., 2481; Shan., 3216.

That act came before this Court for construction and was treated as valid without considering the question of its constitutionality in *Harmon v. Hagerly*, 88 Tenn., 705, and *Bank v. Stockell*, 92 Tenn., 252. In each instance the enactment was

confined to its terms, and was held, not to embrace a note actually given for an interest in a patent but not showing that fact upon its face.

With a view of compelling a recital of that fact in all such notes, and bringing them within the operation of that Act Ch. 77 of the Acts of 1897, that now under consideration, was passed.

It is supplemental to the Act of 1879 and only penalizes the seller's failure to have any written obligation he may take for a patent or any interest therein show upon its face the consideration for which it is given and thereby renders the former enactment more efficient.

The two statutes are to be construed together as different parts of the same legislative scheme. Their combined effect when each is strictly observed and enforced, is simply to prevent written obligations for the purchase of patents or interests therein from being negotiable in the highest sense, and to subject them in whosoever hands to all defenses available to the maker against the original payee.

So construed, neither act by itself, nor the two combined into single scheme, can be truly said to contravene any provision of the Federal Constitution or Statutes in reference to patents, or to restrict or impair the right of sale guaranteed thereby. The grant of an exclusive right to sell a patent in Tennessee does not imply that the State shall maintain such laws as will make notes executed for such patents or an interest therein negotiable, nor that

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it shall not pass laws subjecting them to all proper defenses as against all holders. It might be to some pecuniary advantage to some real or pretended patentee that notes executed to him for his patent, or an interest therein should be closed with the completest negotiability, but the privilege of enjoying that advantage is not embraced in his right to sell, nor is a statute that denies him such advantage, an abridgment of that right, or a detraction from it. A patentee's right of sale as such is, of course, the same in every state; and yet it is obvious that his sale notes may be negotiable in some States, and non-negotiable in others according to their local laws on that subject.

Again if his right of sale, which must be the same in every State, included the privilege of demanding negotiability of sale notes, all States though otherwise empowered and permitted to adopt laws of the one type or the other at will, would be constrained, at least as to him, to conform them to his personal interest, an idea not to be entertained for an instant. See *Tod v. Wick*, 36 Ohio St. 370.

These statutes are also sustainable as valid police regulations, having been passed in good faith for the real promotion of the public welfare, and being well calculated to accomplish that end through the fair and much needed protection thereby afforded against imposition and fraud so often and so easily perpetrated in the sale of the peculiar incorporeal right, or intangible property, contemplated.

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We are aware of no case in which the Supreme Court of the United States has considered the validity or invalidity of like legislation. The decisions of other Courts are not uniform. Some of them deny and others affirm the constitutionality of similar statutes, the earlier adjudications being mainly of the former class and the later ones generally of the latter class. Among the cases in which the denial is made are: *Ex parte Robinson*, 2 Bissell, 309; *Helm v. Bank*, 43 Ind., 167 (S. C. 13 A. R., 395); *Hollida v. Hunt*, 70 Ill., 109 (S. C. 22 Am. Rep., 63); *Cranson v. Smith*, 37 Mich., 309 (S. C. Am. Rep., 514); *Crittenden v. White*, 23 Minn., 24 (S. C. 23 Am. Rep., 676); *Woolen v. Banker*, Am. Law Rec., 236 (S. C. note, 22 Am. Rep., 69). And among those making the affirmative are: *Berchill v. Randall*, 102 Ind., 258 (S. C. 52 Am. Rep., 695); *Nevo v. Walker*, 108 Ind., 365 (S. C., Am. Rep., 40); *Tod v. Wick*, 36 Ohio St., 370; *Hashell v. Jones*, 86 Pa. St., 173; *Hedrick v. Roessler*, 109 N. Y., 127; *Tilson v. Gatling*, 60 Ark., 114; *Mason v. McLeod*, 57 Kan., 105 (S. C. 41 L. R. A., 548). If necessary, other cases of each line might be cited.

Ex parte Robinson, *supra*, which stands at the head of those cases declaring legislation of this kind violative of the Federal Constitution, and upon whose authority the most of them seem to be rested, is believed by some Courts to have been overthrown

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by the reasoning of the Supreme Court of the United States in *Patterson v. Kentucky*, 95 U. S., 501 (*Reeves v. Corning*, 51 Fed. Rep.; *Berchill v. Randall*, 102 Ind., 297); but a different view of that reasoning was expressed and the doctrine of *Ex parte Robinson* applied in *Castle v. Hutchinson*, 25 Fed. Rep., 304. However that may be, it is certain that the earlier Indiana cases which followed *Ex parte Robinson* have been overruled by later ones which distinctly assert the opposite doctrine, as do most of the later cases everywhere. In *Macon v. McLeod*, *supra*, which is the latest of all these cases coming under our observation, the Court after reciting the several provisions of the Kansas statutes, including one like that contained in our Act of 1897, said: "In our opinion these provisions do not touch upon the federal power, nor interfere with the rights secured to the patentee by the Federal law. It is true that no State can interfere with the right of the patentee to sell and assign his patent, nor take away any essential feature of his exclusive right. The provisions in question, however, have no such purpose or effect. They are in the nature of police regulations designed for the protection of the people against imposition and fraud. There is great opportunity for fraud and imposition in the transfer of intangible property, such as exists in a patent right, and many States have prescribed regulations for the transfer of such property, differing essentially from those which control the transfer of

other property. There were some early decisions holding that such regulations trenched upon the federal power and the rights of the patentee, but recent authorities hold that reasonable police regulations may be enacted by the State without usurping any of the powers of the federal government or infringing upon the exclusive right of the patentee."

It cannot properly be assumed that every requirement of the State may make of a patentee in connection with the sale of his patent is an unauthorized and illegal interference with the right granted him by the federal government. Some requirements that have been made from time to time deserve that characterization because really of a burdensome and unjust nature, while others do not, because not of that nature. One instance of the former kind is a requirement that the patentee shall pay a license tax for the privilege of selling his patent in the State. Legislation making this exaction, like that laying a similar burden on interstate commerce (*Robbins v. Taxing District*, 120 U. S., 129; *State v. Scott*, 98 Tenn., 254), is repugnant to the federal Constitution, and, therefore, null and void. *People of New York v. Board of Assessors*, 156 N. Y. L., 417 (S. C. 42 L. R. A., 290); *Kentucky v. Petty* (Ky.) 29 L. R. A., 786; *Tennessee v. Butler*, 3 Lea, 222. An instance of the other kind is afforded by the present enactment, which, as already seen, is neither burdensome nor unjust.

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It should be observed in passing, that there is a marked difference under the law between the right to sell the patent itself and the right to sell the patented article. The federal government protected the former (cases last cited), but not the latter from State taxation. *Webber v. Virginia*, 103 U. S., 344. Indeed, the State may, by reasonable police legislation, actually exclude the patented article, when deemed dangerous, from sale at all in the State. *Patterson v. Kentucky*, 97 U. S., 501, affirming; *Patterson v. Commonwealth*, 11 Bush., 131 S. C. 21 Am. Rep., 220.

Notwithstanding the legal distinction between the right to sell the patent and the right to sell the patented article, so clearly defined in *Patterson v. Kentucky*, 97 U. S., 501, and *Webber v. Virginia*, 103 U. S., 344, and the greater latitude allowed the States in reference to the latter, we think the announcement of their general police power made in each of these cases conclusive in favor of the constitutionality of the Act impeached in this case.

Another ground of the motion to quash (not sustained by the learned Circuit Judge) is that the Act is vicious class legislation, and, therefore, violative of Sec. 8, of Art. 2, of the State Constitution, and void. This impeachment is not sustainable. The Act is, in fact, class legislation, in that it applies alone to those who sell patents or interests therein, but it is not of the vicious kind, because the classification is natural and reasonable, and not

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arbitrary and capricious. The latter and not the former kind of partial legislation is obnoxious to the organic provision mentioned, and also to Sec. 8, of Art. 1, of the State Constitution, and to Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, *Petit v. Minnesota*, 177 U. S., 184; *State v. Schlitz Brewing Co.*, 104 Tenn., 731, 732, and citations. The fact that patent rights constitute a large and peculiar class of property, and that sales of them afford unusual and peculiar opportunities for the employment of imposition and fraud is a good reason for the passage of a law applicable to them alone. It commends the present Act's classification as reasonable and natural, and saves it from condemnation as invalid class legislation. Indeed, it is not essential to the validity of class legislation that the ground of the classification should be found by the Court to be so distinct and potent, as it undoubtedly is in this case. "The State may distinguish, select, and classify objects of legislation, and necessarily the power must have a wide range of discretion." *Magoun v. Illinois Trust & Savings Bank*, 170 U. S., 294.

"And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid, because not depending upon scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless pal-

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pably arbitrary.” *Orient Insurance Co. v. Daggs*, 172 U. S., 562.

The last two cases, with many others, decided by the same distinguished Court, were cited on the same subject in *State v. Schlitz Brewing Co.*, 104 Tenn., 732.

Discovering no constitutional infirmity in the law challenged by the defendant, but being satisfied of its validity for the reason stated herein, the judgment of the Court below is reversed and the case remanded for further proceedings.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1901.

RAILROAD v. HALL.

(Knoxville. September 21, 1901.)

1. **ACTIONS.** *Maintainable by possessor of personalty for its destruction.*

In an action against a railway company for killing his cow the plaintiff can recover upon proof that he was in actual, exclusive, and undisputed possession of the animal, claiming it as his own, at the time it was killed, although he was not able to show a complete title to same.

Cases cited: Crawford v. Bynum, 7 Yer., 381; Criner v. Pike, 2 Head, 398; Carson v. Prater, 6 Cold., 567.

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2. SAME. *Pleadings sufficient.*

And plaintiff may recover upon such proof of possession, without proof of title, although the averment of the pleadings was that the cow was plaintiff's property.

FROM CLAIBORNE.

Appeal in error from Circuit Court of Claiborne County. H. T. CAMPBELL, J.

MONTGOMERY & ARNOLD and JOUROLMON, WELCKER & HUDSON for Railroad.

J. H. S. MORRISON and J. D. HALL for Hall.

WILKES, J. This suit was commenced before a Justice of the Peace, by warrant, charging the railway company with killing the plaintiff's cow. The Justice gave judgment for the plaintiff for \$20, and, on appeal to the Circuit Court, this was affirmed, the cause being heard without a jury by the trial Judge. From his judgment there is an appeal to this Court and an assignment of errors.

The real defense, and the only one on the merits, is that the cow which was killed did not belong to the plaintiff. It appears from the proof that in June, 1898—about two years previous to the killing of this cow—a calf was badly crippled by a train near the defendant's home, and was left in a very

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critical condition, unable to feed itself and almost dead. No one claimed to be the owner of it or gave it any attention, and it appeared to be abandoned. It was taken into plaintiff's possession and attended to until it was restored to health, and has ever since been claimed by him as his property, without any adverse claim by any one else, although the plaintiff made inquiry for the true owner. This is the cow that was killed.

No controversy is made but that the cow was killed by the railroad company, nor is any question made as to the valuation. Under these facts the plaintiff is entitled to recover. If the plaintiff has not a complete right and title to the cow, he had the actual and exclusive possession, and this is sufficient to enable him to maintain this action against a mere stranger having no right, and to recover the value of the property. *Crawford v. Bynum*, 7 Yerg., 381; *Criner v. Pike*, 2 Head, 398; *Carson v. Prater*, 6 Cold., 567.

It is objected that the summons describes the cow as the property of plaintiff. This is not material. If she is not exclusively his property, under the fact of actual exclusive possession, this would be immaterial.

The judgment is affirmed with costs.

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SIBLEY v. STATE.

(*Knoxville.* September 21, 1901.)

1. CONSTITUTIONAL LAW. *Game and fish laws.*

A statute, enacted for the protection and preservation of fish in that portion of a particular river situate in a designated county, if otherwise free from infirmity, is not unconstitutional as arbitrary and capricious class legislation, although such river extended into other counties and there were other rivers in said county, none of which were subjected to like restraint or regulation. Such special legislation is authorized by that clause of the Constitution which provides that "the General Assembly shall have power to enact laws for the protection and preservation of game and fish within the State, and such laws may be enacted for and applied and enforced in particular counties or geographical districts designated by the General Assembly."

Constitution construed: Art. 1, Sec. 8; Art. 11, Sec. 13.

Act construed: Act 1899, Ch. 85.

Cases cited: *Maney v. State*, 6 Lea, 218; *Peters v. State*, 96 Tenn., 682.

2. SAME. *Same.*

But a statute forbidding the erection and maintenance of dams, essential to the operation of industrial plants, in such manner as to prevent fish from ascending or descending a river, is not such law for the protection and preservation of fish as may be applied and enforced as to that part of a river situate in a single county under said clause of the Constitution.

Constitution construed: Art. 1, Sec. 8; Art. 11, Sec. 13.

Act construed: Acts 1899, Ch. 85.)

FROM CARTER.

'Appeal in error from Circuit Court of Carter County. H. T. CAMPBELL, J.

Sibley v. State.

TIPTON & MILLER for Sibley.

ATTORNEY-GENERAL PICKLE for the State.

WILKES, J. The defendent (Sibley) is General Manager of the Watauga Lumber Company, a corporation constructing booms and doing business on the Watauga River, in Carter County and elsewhere. He is convicted of a violation of the Act of March 3, 1899. This Act is as follows:

“SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That no person, firm, or corporation shall hereafter erect or build any dam or other obstruction across the waters of the Watauga River in Carter County, so as to prevent the free passage of fish up and down the waters of the same.

“SEC. 2. *Be it further enacted*, That all persons, firms, or corporations now owning or using any such dam or obstructions, whether for the purpose of booms or other use, shall immediately provide a sluice or waterway, not less than ten feet in width and five feet in depth of water, such sluice or waterway to be in and upon the natural bed of the river, or so cut and constructed as to make such flow or waterway upon the ground adjacent to such dam and natural bed of the river, for the free, easy, and unobstructed passage of fish up and down the waters of the same, which said way shall be kept open at all seasons of the year.”

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The company was incorporated under the laws of Tennessee in December, 1889, and again chartered September 25, 1897. The booms constructed by it enable it to float logs from various streams to the company's plant at Watauga, where they are manufactured into lumber. It has extensive tracts of land in North Carolina, does a large lumber business, and its plant is valued at \$100,000. Defendant claims that there was a fishway left in the dam, constructed by it, sufficient and suitable for a passage-way for fish up and down the river, and that in no other way can the dam be operated to advantage except as now constructed.

The Court charged the jury, that if there was a waterway that afforded a reasonably free and easy passage for fish up and down the stream at at any and all seasons, then the Legislative requirement would be met, and the defendant would not be guilty, but if no such way was provided, and by reason thereof, fish were prevented from passing at any season, defendant would be guilty as charged.

Two assignments on the merits are made, one, that the evidence does not support the verdict, and the other, that the Act is unconstitutional.

While there is some conflict of evidence we think the case is made out that the passage of fish up and down the stream is materially interfered with by the dam, and that no sufficient passageway, as contemplated by the Act, is provided.

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It is said the statute violates the provisions of Article 1, Section 8 of the Constitution of Tennessee, in that, it applies alone to Carter County, and to the Watauga river, in Carter County, and that such application makes a classification unnatural, arbitrary, and capricious; that it tends to deprive the the Company of rights under its charter, and to a large extent impairs the value of its property and franchises. It appears from the record, that the Watauga, Doe, and Elk Rivers all run through Carter County, and the argument is that the Act should apply to all the rivers in the County or to the Watauga river in all the counties through which it runs. It is contended that the Act in controversy is authorized by Section 13, Article 11 of the Constitution of Tennessee, which provides "The General Assembly shall have power to enact laws for the protection and preservation of game and fish within the State, and such laws may be enacted for, and applied, and enforced in particular counties or geographical districts designated by the General Assembly." Under this language the Legislature has the right to designate the locality in which fish and game laws shall be applicable, and may limit them to any geographical district, whether a county or less than a county, and whether in one stream or in a number of streams in the same county. Indeed, it may be very important for the protection of fish to apply the law to one stream and not to another, and to one portion of a stream

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and not to other parts of the same stream. So in regard to game, it may be protected in one county, while across the line, not twenty feet distant, it may not be protected. We do not find any warrant in the language for holding that the Legislature must protect all the streams in any county, if it protects any, nor that it must protect the entire stream from head to mouth, when its object may be to protect it in only a certain county, part of a county, or other geographical district. . The limits of a geographical district may be fixed as to fish by the streams as well as by the boundaries of any land district, division, or county. *Mancy v. State*, 6 Lea, 218; *Peters v. State*, 12 Pickel, 682 (S. C. 33 L. R. A., 114.)

The proper construction of the constitutional provision is, however, a matter of much importance. It will be seen that the Constitution authorizes the Legislature to enact laws for the protection and preservation of fish and game, etc. Under this provision the Legislature has from time to time, and frequently, passed laws against the killing of game in certain seasons, and the taking of fish by traps, nets or seines, or their destruction by poison or dynamite; and all such laws seem appropriately to be in furtherance and accordance with the provision to protect and preserve game and fish. But it is difficult to see how this Act tends to protect and preserve fish. The existence of a dam or of a passageway does not tend to protect or preserve

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the fish in the stream, but at most affects their free passage in the stream. It is true that by such dam fish above may be prevented from descending and fish below from ascending the stream, but neither of these things is in any way necessary to their protection or preservation. Indeed, such dams, by restricting the passage of fish, may tend to their preservation and protection, instead of being to their injury and destruction. The constitutional provision does not extend to the uniform distribution of fish along the course of the stream, so that people along its waters may have an equal chance to take and use them, but only to their protection against violence and wasteful taking and destruction. On the other hand, it is a matter of judicial notice that our non-navigable streams are full of dams for the operation of mills and industrial plants, and the maintaining of such dams in their integrity is essential to the successful operation of the plants, as in this case.

It cannot be that the Legislature, under this constitutional provision, can authorize the cutting of these dams, which would result in the practical destruction of many of the plants in order that fish may have the liberty of the streams and be unimpeded in passing up and down them, when such passage is not shown in any way to be necessary or essential to their protection and preservation. There is ample scope for the operation of the provision without so construing it as to authorize the

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injury and destruction of industrial plants, much more valuable and essential to the public good than the fish that swim in the waters. Neither could farmers, under this constitutional provision, be required to leave apertures in their inclosures and fences in order that game might wander at will through the country.

We are of opinion that the Act in question is not authorized by the constitutional provision relied on, and that it is obnoxious to the Constitution and void because in conflict with Sec. 8 of Art. 1, and is partial, and not the law of the land. There was a demurrer to the indictment, which does not appear to have been acted upon. There was also a motion in arrest of judgment. Each of these should properly have been sustained and the indictment quashed.

The judgment of the Court below is reversed, and indictment quashed.

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RAILROAD v. DEAKINS.

(*Knoxville.* September 21, 1901.)

1. ACTIONS. *Maintainable by consignor against carrier for damages resulting from delay in shipment, when.*

For damages resulting from the carrier's negligent delay in the shipment of goods for sale by the consignee on commission, the consignor can maintain an action. The title to the goods does not in such case vest in the consignee, but remains in the consignor.

2. COMMON CARRIER. *Excuse for failure to deliver goods insufficient, when.*

Such congestion of freight in the carrier's yards as prevents prompt delivery is no excuse for delay in delivery of perishable goods, even if sufficient in ordinary cases, where the carrier's agent, with the knowledge of such congestion, promises to make prompt delivery and thereby prevents the consignor from taking steps to secure the goods.

3. VERDICT. *Not set aside, when.*

A verdict for \$212.50, as damages for delay in delivery of a car load of apples, will not be set aside as excessive, although it is based upon the plaintiff's testimony alone, while another witness, better acquainted with the market than plaintiff, placed the damages at \$169.50.

FROM WASHINGTON.

Appeal in error from Circuit Court of Washington County. H. T. CAMPBELL, J.

Railroad v. Deakins.

KIRKPATRICK, WILLIAMS & BOWMAN for Southern Railway Co.

J. B. Cox for Deakins.

WILKES, J. This is an action for damages for failing to promptly deliver a car load of apples, shipped from Johnson City to Knoxville, Tenn. The suit originated before a Justice of the Peace. On appeal to the Circuit Court there was a verdict and judgment for \$212.50 for the plaintiff, Deakins, and the railway company appealed, and has assigned errors. These apples were consigned to Kaiser Bros., apple dealers, at Knoxville, and were expected by the consignor to arrive and be delivered to them early Saturday morning, in time for the trade of that day, and the road was so notified. They were to be received by Kaiser Bros., on consignment and sold by them on a commission of ten per cent. on gross proceeds of sale. The car load of apples reached Knoxville at 4 o'clock on Saturday morning. At 6 o'clock the agent of the company informed the consignor that he had received bill of lading, and was instructed by the consignor to place the car at Kaiser Bros.' warehouse for unloading, to which he replied, "All right." Later, and about ten o'clock, the plaintiff again requested the agent to place the car at the warehouse, and was answered that it would be done, and there is evidence to the effect that the agent then stated that it was his fault it had not been done earlier. The car was not placed at Kaiser Bros.'

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warehouse until 4:30 or 5 o'clock Saturday evening, too late for the Saturday market deliveries, and the weather being hot, the apples were badly damaged before they could be unloaded on Monday. Some additional expense was incurred in assorting them.

The first assignment of error is to the effect that the suit should have been brought in the name of Kaiser Bros., and not in that of Deakins. This was not error. The apples were consigned to Kaiser Bros., to be sold by them on commission, and they were not sold to them, and the fact that they were thus consigned did not vest the title to them in Kaiser Bros. Until sold, the title to the apples was in Deakins, and at no time was it in Kaiser Bros.

It is said it was error to give judgment against the company for any damages, because there was a congestion of freight in the yards of the company, which prevented an earlier delivery. Whether this would constitute a good excuse for delay in delivery in ordinary cases, we need not consider, as the agent of the company knew of the congestion, and yet promised to make the delivery, and thus prevented the consignee from coming to the depot or other usual place of delivery of freight and receiving the apples.

It is said there is no material evidence to support the verdict. This assignment is directed to the amount of damages found against the company. The plaintiff estimated these damages at \$212.50,

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and gave an itemized statement of them. He said, however, that Kaiser Bros. knew more about the market than he did, and were more competent than he to speak on that subject. They gave an itemized estimate and fixed the damages at \$169.50. The plaintiff, after taking the deposition of Henry Kaiser, of the firm of Kaiser Bros., declined to read it, and it was read by the defendant company as its own evidence. The amount of damages was a question which addressed itself to the sound judgment of the jury, and it having fixed the amount at \$212.50, and there being evidence to support their finding, it will not be disturbed by this Court. The plaintiff was not bound by the valuation placed on the apples by Mr. Kaiser, although he had referred to him as having superior information and judgment, especially as he did not read his deposition, but declined it.

There is no reversible error in the record and the judgment of the Court below, and the judgment is affirmed, with costs.

McKinney v. Street.

McKINNEY v. STREET.

(*Knoxville*. September 21, 1901.)

1. HUSBAND AND WIFE. *Wife not estopped by husband's act to claim her lands.*

The wife is not estopped to claim and recover her lands from a person to whom the husband has sold same, even where she knew of and approved the sale, or joined in it by title bond, and the husband has collected the purchase price or recovered same in a suit to which she was not a party, but equity will compel her to account for and restore any part of the purchase price she may have received personally, and will enforce the same against the land.

Cases cited: Gillespie v. Worford, 2 Cold., 696; Moseby v. Partee, 5 Heis., 31; Aiken v. Suttle, 4 Lea, 105; Jarnigan v. Levisy, 6 Lea, 400; Wright v. Duffield, 2 Bax., 221; Pilcher v. Smith, 2 Head, 208; Davis v. Jennings, 3 Tenn. Ch., 241; Rhea v. Iseley, 1 Shann. Cas., 220.

2. EVIDENCE. *Record incompetent.*

And in the wife's action to recover her land from the husband's purchaser, the record of an action in which he had recovered the purchase price, to which she was not a party, is not admissible in evidence against her.

FROM CARTER.

Appeal in error from Circuit Court of Carter County. H. T. CAMPBELL, J.

McKinney v. Street.

TIPTON & MILLER for McKinney.

BOREN, FOLSOM & EDENS and SIMERLY & ALLEN
for Street.

WILKES, J. This is an action of ejectment by Celia McKinney, suing by her husband as next friend, and joined by him as an individual, to recover from the defendants a tract of sixty-five acres of land in Carter County. The contention is for a recovery in the right of the wife. The cause was heard by a special Judge, without a jury, in the Court below, and relief was denied the complainant wife upon the theory that she had, by her conduct, estopped herself from suing for the land. Complainants have appealed to this Court and assigned errors.

It appears that William McKinney, the husband and next friend of Celia, sold to the defendants three separate tracts of land at the same time and in a "lumping trade." He executed a bond to make title upon the payment of the balance of purchase money. All of this purchase money not having been paid, William McKinney brought suit in Chancery to collect the balance. This suit resulted in a decree ordering a portion of the land sold for the purchase money unpaid, but adjudging that the sixty-five acres in controversy was free from any lien, and could not, therefore, be sold for the purchase money. The sale made failed to bring the whole

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of the purchase money by about \$250. Thereupon this suit was brought to recover the unsold portion of the land, upon the ground that the title to it was in the wife and she had never parted with the same.

It appears from the proof that the wife did not sign the title bond, nor any other papers connected with the sale of the land; that she was no party to the suit to enforce the sale of the land in affirmance of the contract, and to recover the purchase money, but that she knew her husband was making the sale of the land, and she approved and consented to the same. It appears that a horse, bridle, and saddle was part of the consideration paid for the land, and that they were delivered to the husband for her, but that they actually went into her possession is not proven. She denies that she ever received them, and has neither retained them nor made any offer to do so. No question is made as to the original title of Celia McKinney. It is traced to the State, and is fully shown to have been in her. The sole and only question upon the merits is whether Celia McKinney has, by her conduct, estopped herself to sue for and recover the land.

The Court below, over objection of complainant, Celia, allowed the record of the Chancery Court, brought by her husband, William McKinney, to enforce collection of the purchase money by sale of the land, to be introduced in evidence against her. This, we think, was error. The wife was not

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a party to that suit, nor did she sign the title bond on which it was based. The judgment or decree in that case against her husband could not operate to deprive her of her land, or encumber the same, or estop her to assert her right to the same. Code, § 4234. Nor were the proceedings in that case competent to be used as evidence against her.

It being shown, and not disputed, that the original title to the land in controversy was in Celia McKinney, by grant from the State and by proper mesne conveyances, the Court is of opinion she cannot be deprived of it by operation of any rule or principle of estoppel in this case. And this would be true even if she had signed the bond for title, as such bond is not obligatory upon a married woman. She would, therefore, have a right to recover back the land, even though the purchaser may have paid for it. It is true that in a Court of equity she would not be allowed to retake the land without restoring such of the purchase money as was actually received by her. In this case, however, the evidence does not show with any certainty that she received any portion of it herself. The only evidence tending to show such a fact is the statement of defendant that Celia McKinney told him, while the negotiations were pending for a sale of the land, that if the sale was made she was to have a mare, side-saddle, bridle, and cow out of the proceeds, and that he turned over to William McKinney, her husband, such articles for her. But

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there is no proof that the husband ever delivered them to her, or that she received them in any way, or from any person. The case is governed by the principle laid down in the cases of *Gillespie v. Worf*, 2 Cold., 696; *Moseby v. Partee*, 5 Heis., 31-36; *Aiken v. Suttle*, 4 Lea, 105; *Jarnigan v. Levi-sey*, 6 Lea, 400; *Wright v. Duffield*, 2 Bax., 221; *Pilcher v. Smith*, 2 Head, 208; *Davis v. Jennings*, 3 Tenn. Ch., 241; *Rhea v. Iseley*, 1 Shann. Cas., 220.

In the case of *Pilcher v. Smith*, 2 Head, 208, it appeared that the woman executed a bond to convey title to land, and that the purchase money was wholly paid to the husband as her agent. She brought ejectment for the land. A bill was thereupon filed by the purchaser seeking a specific execution of the contract, and to have the purchase money refunded and compensation for improvements, and to enjoin the ejectment suit. This Court refused to execute the contract, on the ground that the title bond was that of a married woman, and, therefore, void, but decreed that under the bill filed, asking for general relief, she should be compelled to refund the purchase money.

In *Aiken v. Suttle* the married woman executed a power of attorney to sell her lands, which was duly acknowledged and registered. Under it the land was sold and conveyed by the attorney in fact. The married woman afterwards sought to have her right to the land declared, and clouds, etc., re-

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moved, and the Court granted the relief on condition that she restore so much of the purchase money as she actually received the benefit of, and interest on it.

In *Rhea v. Iseley* the married woman conveyed the land, but the instrument was defectively acknowledged. It was held that she might avoid the sale, and as she had not actually received the purchase money, she would not be compelled to refund it.

We cannot see that any great injustice results to the defendants. According to their own statement they bought the three tracts in what they call a "lumping trade"—that is, for so much for the three tracts, and while, if we could look to it, the Chancellor appears to have decreed that the sixty-five acres had been paid for, still, defendants state in the present suit that a portion of the entire price was unpaid, and that they understood that this was on the three tracts as a whole, and that they had not fully paid for any particular tract. The only evidence of payment for this tract is found in the Chancery record, to which Celia McKinney was not a party, and which, we think, was not competent to be used as evidence against her.

The judgment of the Circuit Court Judge is, therefore, reversed, and judgment for complainant, Celia McKinney, will be entered here for the land in controversy and all costs. But no decree will be given for damages under the facts in the case.

Pile v. State.

PILE v. STATE.

(*Knoxville.* September 28, 1901.)

WITNESS. *Enforcement of rule.*

The rejection of a material witness for the defendant in a felony case, on the ground that he had entered the court room and heard part of the evidence, in violation of the rule, constitutes reversible error when the witness violated the rule through ignorance and without fault of himself, or the defendant or his counsel.

Case cited: *Smith v. State*, 4 Lea, 428.

FROM UNION.

Appeal in error from Circuit Court of Union County. W. R. HICKS, J.

J. C. J. WILLIAMS for Pile.

ATTORNEY-GENERAL PICKLE for State.

CALDWELL, J. Wayne Pile, the plaintiff in error, is under conviction for an assault on John Nelson, the prosecutor, with intent to commit voluntary manslaughter. A. J. Campbell, one of the State's witnesses, testified that he heard Pile, while talking with George Fox, sometime before the encounter, make a violent threat against Nelson. Pile offered

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to contradict that testimony, *in toto*, by George Fox, but the Court refused to permit Fox to be examined, because he had heard some of the State's evidence and had not been under the rule with the other witnesses. An investigation disclosed the fact that Fox resided some distance from the county seat; that he was not present when the Court commenced, and was not expected for some hours; that he arrived late in the day, but sooner than was anticipated, and went into the court room, and there remained, as he supposed it was his duty to do, and that this occurred without the knowledge of the defendant or his counsel. This disclosure, in our opinion, made a clear and obvious case for the admission of the proposed testimony. The intended witness was entirely without fault, and so were the defendant and his counsel. The testimony rejected was very material to the defense and might have changed the result. Such being true, the testimony should, undoubtedly, have been admitted. *Smith v. State*, 4 Lea, 428.

Reverse and remand for a new trial.

Mitchell v. Orr.

MITCHELL v. ORR.

(*Knoxville*. September 28, 1901.)

GAMING. *Loser may recover lost money, when.*

By statute, though not at common law, the loser may recover back money wagered, lost, and paid upon the result of a primary election.

Code construed: §§ 3159, 3161 (S.); §§ 2438-2440 (M. & V.); §§ 1769-1771 (T. & S.).

Cases cited: *Whiteside v. Ex. of Tabb. Cooke*, 384; *Porter v. Jones*, 6 Cold., 324; *Stanford v. Howard*, 103 Tenn., 29; *Allen v. Dodd*, 4 Hum., 133; *Smith v. Stephens*, 5 Sneed, 254; *Williams v. Taliaferro*, 1 Cold., 39; *McGrew v. City Produce Exchange*, 85 Tenn., 572; *Bell v. State*, 5 Sneed, 507; *Eubanks v. State*, 3 Heis., 488.

FROM CARTER.

Appeal in error from Circuit Court of Carter County. GEORGE E. BOREN, Sp. J.

JOHN H. TIPTON and W. D. HUNTER for Mitchell.

SIMERLY & ALLEN and GREEN & SHIELDS for Orr.

WILKES, J. This is an action to recover \$300 lost and paid on a wager upon the result of a primary election in Carter County. There is no

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question of the statute of limitations involved and no contest over the facts, they being agreed to. There was a trial before a special Judge in the Court below, and the plaintiff was denied the right to recover back the money, and he has appealed and assigned errors.

The only question involved is whether money wagered, lost, and paid over upon the result of a primary election can be recovered by the losing party. It is conceded that at common law it could not be. *Whiteside v. Ex. of Tabb. Cooke*, 384; *Porter v. Jones*, 6 Cold., 324; *Stanford v. Howard*, 19 Pickle, 29. If any recovery can be had, it must be under and by virtue of our statutes.

Shannon, § 3159 provides, "All contracts founded in whole or in part on a gambling or wagering consideration shall be void to the extent of such consideration." Section 3161 provides, "Moreover, any person who has paid any money or delivered anything of value lost upon any game or wager may recover such money, thing, or its value, by action commenced within ninety days from the time of such payment or delivery."

These sections are taken from the Acts of 1799, Ch. 8, and are in substance the provisions of that Act. It is held in a number of cases that wagering upon an election is not embraced by these statutes, and that money lost in betting on legal elections could not be recovered by the losing party. *Allen v. Dodd*, 4 Hum., 133; *Smith v. Stephens*, 5

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Sneed, 254. But in *Williams v. Talliaferro*, 1 Cold., 39, it was said: "By our statute betting on elections is declared to be gaming," and the Court held that the losing party might recover back land lost and conveyed as the result of a wager on an election, and likewise his creditors could recover in his right, or upon the idea that as against the creditors of the loser the conveyance must be treated as voluntary and fraudulent. These cases all have reference, however, to legal elections held under authority of law, and do not in terms and were not intended to embrace primary elections held by consent to determine the choice of a party as to who should be its candidate in the regular election. We do not think it necessary to determine whether there is, in the sense of these laws and decisions, any difference between legal elections and primary elections. The question is presented whether the hazard of money upon the result of a primary election comes within the letter and spirit of the Acts to which we have referred, so as to authorize a recovery of the money paid.

We think the case of *McGrew v. City Produce Exchange*, 1 Pickle, 572, is, in point and on principle, conclusive. In that case it is said: "The plain language (of the statute) is that money lost upon any game or wager may be recovered."

"Mr. Bouvier defines a wager to be a contract by which two parties or more agree that a certain sum of money, or other thing, shall be paid or

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delivered to one of them on the happening or non-happening of an uncertain event.” Again: “It is now settled in this State that gaming is not confined to playing at any game of hazard or address for money, etc., in the ordinary sense of these words as used in § 6804 of Shannon’s Code, but it is any agreement between two or more persons to risk money or property on a contest or chance of any kind, when one must be gainer and the other loser,” citing *Bell v. State*, 5 Sneed, 507; *Eubanks v. State*, 3 Heis., 488, 490. . . . “It matters not what the unlawful device is upon which the money is received as a hazard, it is gaming,” and, we add, if there is no unlawful device, but the hazard is upon the result of a lawful, but uncertain, event by which one will lose and the other gain, it is gaming.

Hence this Court held in the case of *McGrew v. City Produce Exchange*, 1 Pickle, 572, that dealing in futures was gaming, and came under the provisions of the statute, and the losing party was entitled to recover. We cannot give to the statute the narrow construction that, in order to constitute “gaming” and “wagering,” there must be the hazard of money or property upon some game or device which is instituted or prosecuted in order to determine the hazard. That is one form of gaming or wagering, but under our laws it is not now confined to such narrow limits. In this case there was a wager of money upon an uncertain event—that is,

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a contest between two persons as to which should be the candidate of his party at a legal election to be held after the primary. It is called an election, but it may as well have been called a selection or a test, or a designation, and the wager might as well have been upon the result of a convention or mass meeting. In any event the result was uncertain, and upon this uncertainty the hazard was based, and we are of opinion it falls within the provisions of the statute and is controlled by the cases in 1 Cold. and 1 Pickle referred to, and the plaintiff is entitled to recover the amount paid. But we think it is a case where, in our discretion, we may refuse interest, and we, therefore, allow no interest.

The judgment of the Court below is reversed and judgment for plaintiff will be entered here for the \$300, and all costs, but no interest.

Holt v. State.

HOLT v. STATE.

(*Knoxville*. October 3, 1891.)

1. CRIMINAL PRACTICE. *Election by State must be made, when.*

Where, under an indictment charging the offense of unlawfully carrying a pistol, in a single count, the State introduces evidence of the commission of that offense by the defendant at several different times and places, it is reversible error for the Court to refuse to compel the State, on defendant's motion, to elect and state for which of the several offenses conviction will be sought.

2. SAME. *As to admitting evidence of other distinct offenses.*

Under an indictment charging the defendant, in a single count, with unlawfully carrying a pistol, it is competent for the State to prove several distinct offenses committed at different times and places, but, upon defendant's motion asking it, the Court must require the State to elect and state the occasion for which conviction will be sought, and exclude from the jury all evidence relating to carryings on other occasions. The same rule applies to liquor and gaming cases.

Cases cited: *Wright v. State*, 4 Hum., 194; *Hampton v. State*, 8 Hum., 69; *Cash v. State*, 10 Hum., 111; *Boyd v. State*, 7 Cold., 77; *Lawless v. State*, 4 Lea, 178; *Tillery v. State*, 10 Lea, 35; *Foute v. State*, 15 Lea, 712; *Luttrell v. State*, 85 Tenn., 233.

FROM COCKE.

Appeal in error from Circuit Court of Cocke County. W. R. HICKS, J.

Holt v. State.

W. H. JONES for Holt.

ATTORNEY-GENERAL PICKLE for State.

CALDWELL, J. John Holt prosecutes this appeal in error from a judgment of conviction for unlawfully carrying a pistol. The State introduced one witness whose testimony tended to show the commission of that offense at one time and place, and other witnesses whose testimony tended to show a like breach of the law at another time and place. At the conclusion of the whole evidence the defendant moved the Court to require the State to elect which of the two imputed infractions the jury should try him for. That motion was overruled and the entire case submitted for a verdict. The Court's action was erroneous. Election should have been required.

It is usual and entirely permissible for the State, in a prosecution for the unlawful carrying of a pistol, for gaming, or for the unlawful sale of liquor, to introduce evidence of any number of violations not barred, and that, too, though the presentment or indictment have but a single count and charge but one violation, as in this instance. That does not imply, however, that there can be a separate conviction in such a case for every infraction proven, nor that the State, over the timely objection of the defendant, may have a general trial for all of them and a conviction for one. Such a result as that in either event would be contrary to all the precedents.

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Testimony tending to show one breach, and another, and another, and so on, is allowed in these small cases for the reason, mainly, that the State may not know in advance which breach can be sufficiently proven; but when all the developments have been made and the evidence on both sides has closed, the defendant who has been arraigned for a single infraction is entitled to have the State make an election and designate the particular one for which it will ask a conviction. Being subject in the given case to conviction for only one offense, the defendant should be tried for only one, and that one the State should particularize when he so demands. Otherwise a verdict of guilty may be returned and an innocent man convicted, when the minds of twelve men have not agreed as to any particular infraction. For instance, some of the jurors may be convinced of this alleged infraction, others of that, and the others of still another, and thus, with the several charges before them, they may all readily concur in a general conviction, when less than half of them believe that any particular charge has been established. A rule of practice which may involve a defendant in a hazard like that is certainly unsound.

This hazard may probably be reduced to a minimum by directing the jury to return a special verdict specifying the breach found to be proven, as was done in the present case; and yet, a defendant, even in that view, would be greatly prejudiced, in

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that his counsel, in addressing the jury, would be obliged to discuss, and the jurors, in making up their verdict, would have to consider each alleged breach, which, after all, would be little less than a trial of a defendant on testimony concerning several offenses, when he had been impleaded and arraigned for but one. When the election is made, the Court should withdraw the testimony peculiar to every other supposed violation, and leave the jury to consider only that violation on which the State elects to stand.

The familiar rule that allows the inclusion of more than one offense of the same grade or class in as many separate counts of the same indictment, and a trial on all the counts at the same time (as in *Wright v. State*, 4 Hum., 194; *Hampton v. State*, 8 Hum., 69; *Cash v. State*, 10 Hum., 111; *Boyd v. State*, 7 Cold., 77; *Lawless v. State*, 4 Lea, 178; *Tillery v. State*, 10 Lea, 35; *Foute v. State*, 15 Lea, 712, and many other cases), does not justify the action taken in this case; for that rule contemplates a separate charge for each offense, and authorizes a trial for no offense that is not separately charged; in other words, a defendant, under that practice, is put upon his trial for exactly what he is charged with—two, three, or four offenses—nothing else and no more; whereas this defendant was charged with but one offense and tried for two with the power of election in the jury.

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Though always allowable, under the rule as to kindred offenses, to unite a charge for forging an instrument with one for publishing it as true, and to try the alleged offender on both charges at the same time (*The People v. Reyenlers*, 12 Cow., 425; *Wright v. State*, 4 Hum., 197; *Cash v. State*, 10 Hum., 113), evidence of the publication is never admissible when only a forgery is charged (*Luttrell v. State*, 85 Tenn., 233), because of the other rule protecting a defendant against trial for an offense that is not, or for more offenses than are, charged against him.

No authorities need be cited for the proposition that a defendant cannot be legally tried for two violations of the criminal law when he has been impleaded for but one. That proposition is fundamental and axiomatic, and by it the present case is controlled.

Reverse and remand.

Green Rea Co. v. Holman.

GREEN REA CO. v. HOLMAN.

(*Knoxville*. October 5, 1901.)

1. ACTION. *On a judgment.*

It is not a good defense to an action at law upon a judgment that the plaintiff could have proceeded effectually by execution upon the first judgment, and that the proceeding to recover a second judgment was, therefore, unnecessary and vexatious. The remedy against unnecessary and vexatious suits is by bill in equity to enjoin them.

2. SAME. *Same.*

In an action upon a judgment the plaintiff is entitled to recover the amount of the judgment sued on, with interest from its date, and the costs of both suits, but without interest.

Code construed: § 4938 (S.); § 3921 (M. & V.); § 3197 (T. & S.)

Case cited: Gatewood v. Palmer, 10 Hum., 469.

FROM RHEA.

Appeal in error from Circuit Court of Rhea County. M. D. SMALLMAN, J.

W. B. MILLER for company.

B. G. MCKENZIE for Holman.

WILKES, J. This is an action commenced before a Justice of the Peace upon a judgment theretofore rendered by another Justice of the Peace. It was

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shown that in the original judgment, upon which suit was brought in this cause, the defendant was regularly served with process, and that a judgment was rendered June 5, 1900, in favor of the plaintiff and against the defendant for \$28.76 and \$1.75 cost. Upon this evidence, which was not objected to, the Justice gave judgment for \$20.75, and taxed the plaintiff with the costs of the judgment before him. The Justice refused to give judgment for any interest upon the original judgment or for the costs of it, and plaintiff has appealed and assigned errors. The trial Judge was in error. He should have given judgment for the original judgment and interest upon it from the date of its rendition. He should also have taxed up the costs of the original judgment as part of the costs in the new judgment without interest, and he should have taxed the defendant also with all costs of the second judgment.

It is said the second judgment was unnecessary and vexatious; that execution could have issued on the original judgment, and it would have been as efficacious as if issued on the new one. This may be so, but a plaintiff in an unsatisfied judgment has the right to obtain a new judgment upon it whenever he sees proper, unless perhaps he might be required to await the stay of execution, when stay had been given, or the defendant might bring suit to enjoin judgments repeated so often as to be vexatious. If the defendant desires to escape this

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annoyance, he can do so by paying the judgment and extinguishing the cause of action. All judgments bear interest from the date of rendition, unless otherwise provided. Shann., §4938. And when a new judgment is taken it should be for the original judgment and interest from the date of its rendition.

It is proper practice that the costs taxed upon the original judgment, if unpaid, should be retaxed in the second judgment without interest, as costs bear no interest.

The fact that these costs go to parties other than the plaintiff can make no difference. The costs of the original judgment do not go to the plaintiff in that judgment, and yet they are recovered in his name. The legal interest in the costs is in the plaintiff, and in his name and through him must they be collected, and he is liable to the parties entitled as for money paid and received to their use. *Gatewood v. Palmer*, 10 Hum., 469. The costs of the second judgment should be taxed to the losing defendant. This is not a matter in the discretion of the Court in such case, but is fixed by the statute. Shann., §4938. This section is as follows: "The successful party in all civil actions is entitled to full costs, unless otherwise directed by law, for which judgment shall be rendered."

The judgment of the Court below is reversed and judgment will be entered here for the plaintiff

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for \$28.75, and interest since June 5, 1900, and all costs. In taxing up the cost the Clerk will include the \$1.75 on the original judgment and all costs in the Court below, and in this Court in the present case.

Templeton v. Nipper.

TEMPLETON v. NIPPER.

(*Knoxville*. October 5, 1901.)

PUBLIC WORKS. *Commissioners for letting not liable for failure to take bond for protection of laborers and materialmen, when.*

The benefit of the bond required by Acts 1899, Ch. 182, for the protection of laborers and furnishers of material on public works let by State, county, or city, does not extend to one who furnishes labor or material in the construction of such works to a subcontractor, and, therefore, the commissioners who let such contracts are not liable to such person for their negligence in failing to take such bond.

Act construed: Acts 1899, Ch. 182.

Case cited: Rhea County v. Sneed, 105 Tenn., 531.

FROM RHEA.

Appeal in error from Circuit Court of Rhea County. M. D. SMALLMAN, J.

A. P. HAGGARD and V. C. ALLEN for Templeton.

B. G. MCKENZIE for Nipper.

BEARD, J. The plaintiffs in error, under appointment of the County Court of Rhea County, were commissioners authorized to let the contract for and superintend the construction of a bridge in that

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county. In pursuance of the power so conferred they contracted for the entire work with the Groton Bridge Company, which company sublet the construction of the superstructure to one Thompson, who afterwards sublet it to another party. The defendant in error, an employee of this second subcontractor, did work upon it, for which he has not been paid. The bridge has been finished and the agreed consideration for the same has been paid by the county to the original contractor.

The present suit was instituted by the defendant in error against the plaintiffs in error, and a personal judgment was sought and rendered against them, upon the ground that they had failed to exact from the Groton Bridge Company a bond as required by Section 1, of Chapter 182, of the Acts of 1899. If the defendant in error is within the provision of that Act then, upon the authority of *Rhea County v. Sneed*, 105 Tenn., 581, the negligence of the commissioners in requiring bond makes them civilly answerable to the defendant in error, and the judgment of the Circuit Court was right; if not, it was wrong and must be reversed. The question then is, Is an employee of a subcontractor within the protection provided by the Act?

It is entitled, "An Act to protect laborers and furnishers of material on public works." By the first section it is provided that "hereafter no contract shall be let for any public work in this State by any city, county, or State authority until the

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contractor shall first execute a good and solvent bond to the effect that he will pay for all the materials and labor used in said contract in lawful money of the United States, provided that this Act shall not apply to contracts under \$100."

By Section 2 it is enacted "that any laborer or furnisher of material may bring an action on such bond and make recovery, in his own name, upon giving security or taking the oath prescribed for poor persons, as provided by law." If there was nothing more in this statute, it might very well be assumed that this bond was intended for the protection of all laborers and material men, however remote in degree they might be from the original contractor. But we think it clear that Section 4 limits the right of the recovery on the bond to a class composed of such persons as are privies in contract with the makers of the bond, and by necessary construction excludes all others. This section provides as follows: "That the laborer or furnisher of materials, to secure advantage of the Act, shall file with the public officer who has charge of the letting of any contract an itemized statement of the amount *owed* by the contractor for materials and labor used."

While it may be that it was the purpose of Section 1 of the Act to require a bond from the original contractor, which would stand as security for all claims for labor done and materials used on a public work without regard to the party at whose

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instance they were furnished, yet we think it clear that, by Section 4, the Legislature has limited liability on such bond to those laborers and material men who sustain contract relations with its maker. Only those persons to whom he is debtor—that is, in the phraseology of the section—those he “owed” are entitled to a right of action on the bond. This excludes from its benefits parties like the defendant in error, who contract with a subcontractor, for in no sense can the maker of this bond be held the debtor of such parties.

It follows that the judgment of the lower Court is reversed and the case is dismissed.

Murphy v. Johnson.

MURPHY v. JOHNSON.

(*Knoxville*. October 11, 1901.)

1. BILL OF REVIEW. *Does not lie, when.*

Bill of review does not lie to review and reverse a decree of this Court, either for error apparent or for newly discovered evidence; and, for this purpose, a decree of the Chancery Court, entered pursuant to the mandate of this Court upon remand of a cause, is treated as the decree of this Court and is not renewable by a bill of review. (*Post*, p. 556.)

Cases cited: *Hurt v. Long*, 90 Tenn., 445; *Wallen v. Huff*, 1 Shann. Cas., 4.

2. BILL IN EQUITY. *Substance, not name, determines its nature.*

The substance, not the name given to it by the pleader, determines the nature of a bill in equity. (*Post*, p. 557.)

Case cited: *Arnold v. Moyers*, 1 Lea, 308.

3. DECREE. *Coram non judice.*

A decree not justified by the pleadings is void, whether rendered by this Court or by the lower Court. (*Post*, p. 557.)

Case cited: *Randolph v. Bank*, 9 Lea, 63.

4. SAME. *Same. Case in judgment.*

The decree in this cause is *coram non judice* and void as to the \$1,250 averred by the bill, and admitted by the answer, to have been paid to the intestate in his lifetime, and not, therefore, chargeable to the administrator. (*Post pp.* 556, 557.)

FROM JEFFERSON.

Appeal from Chancery Court of Jefferson County.
JOHN P. SMITH, Ch.

Murphy v. Johnson.

C. A. FRAME, EUGENE HOLTSINGER and PICKLE & TURNER for Murphy.

PARK & PARK for Johnson.

CALDWELL, J. This bill denominates itself a bill of review, for error apparent as to one item and for newly discovered evidence as to another item of the decree challenged and enjoined. It alleges that C. H. Johnson and his present co-defendants, as next of kin of W. C. Newman, deceased, heretofore filed their bill in the Chancery Court of Jefferson County against J. D. Murphy, as administrator of said Newman, and his present co-complainants as sureties on his administration bond, for an account and final settlement of Newman's estate; that the complainants in that bill, after stating certain preliminary facts, continued: "They aver, further, that said Newman owned little or no real estate at the time of his death, but that he owned a large personal estate. This was made up of household and other property, amounting to some \$400 or \$500, as complainants have been informed, when sold by said administrator, but chiefly the assets consisted of the proceeds of a certain land sale made by said Newman lately before his death. On September 7, 1889, said Newman had sold two tracts of mountain land, in all about 10,000 acres, to H. B. Wetzell and G. A. Rumsey, for the consideration of \$6,000; of this amount \$1,250 was paid in cash, and the purchasers executed to said Newman four notes of

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\$1,000 each, due in six, twelve, eighteen, and twenty-four months, and one other note for \$750, due in thirty months from date, and an express lien was retained in the deed to secure these notes, which deed is registered in Book S, page 430, in Sevier County, Tennessee.” Complainants aver that most, if not all, of these notes went into the hands of the administrator; “that defendants to that bill, besides admitting those preliminary facts, in their answer, said: ‘It is true, that W. C. Newman owned no real estate at the time of his death, but it is not true he owned a large personal estate, consisting of household goods, etc., amounting to about \$500, as respondents now remember, but exact amount will be shown in the proof. It is not true that the assets consisted chiefly of the proceeds of a certain land sale made by the said Newman before his death. It is true that said W. C. Newman did, on September 7, 1889, assume to sell to H. P. Wetzell and G. A. Rumsey the lands mentioned in the bill, on the terms stated—that is, at the price of \$6,000, \$1,250 in cash, and balance in four \$1,000 notes, due in six, twelve, eighteen, and twenty-four months, and one for \$750, due at thirty months,’ “but, title to the land having failed, J. D. Murphy, administrator, on advice of counsel and to avoid litigation, has surrendered to the makers all of the said notes, including one of those for \$1,000, which Newman transferred to him for value; that the Chancellor heard the cause and ren-

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dered a decree against the defendants therein for \$2,088.19; that, on appeal, the Court of Chancery Appeals charged Murphy, as administrator, with \$6,000, the whole consideration of the land, with interest thereon for nine years, eleven months, and thirteen days, and after making some other charges and allowing credit for certain outlays actually made, pronounced a decree against him and his sureties for a balance of \$5,285.09; that the Supreme Court affirmed that decree and remanded the cause for its execution; that upon the remand a decree was entered in the Chancery Court in conformity to the *procedendo*, and that Murphy has since paid to the Master \$2,600 thereon.”

These complainants, by further allegation, then assail the decree for error apparent, because it shows upon its face that it goes beyond and against the pleadings, in that it charges Murphy, as administrator, with \$6,000, the whole consideration for the land, when the bill in that cause expressly alleged, and the answer thereto explicitly admitted, that \$1,250 of that sum were paid in cash to Newman in his lifetime; and, passing to the other item of complaint, they allege the discovery of ample new evidence to show that one of the \$1,000 notes with which Murphy is charged in the decree was, in fact, his own property under a transfer thereof by his intestate, Newman.

The prayer is for an injunction against the collection of the balance of the impeached decree, and

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that it be reviewed and set aside to the extent of the two items of \$1,250 and \$1,000 respectively, with their interest. The defendants demurred, and for cause of demurrer said that the Court had no jurisdiction to review a decree of the Supreme Court. The demurrer was sustained and the bill dismissed. The Court of Chancery Appeals affirmed the decree of the Chancellor, and the complainants have appealed again.

The decree on the *procedendo* was but an entry of the decree of this Court on the minutes of the Chancery Court without alteration, and being so, it is, for the purposes of the present proceeding, to be regarded as the decree of this Court—nothing more, nothing less. So regarded, it is beyond the reach of a bill of review, either for error apparent or for newly discovered evidence. . *Hurt v. Long*, 90 Tenn., 445; *Wallen v. Huff*, 1 Shann. Cas., 4.

Nothing is plainer than that this decree, to the extent of the \$1,250, with interest thereon, is wholly without warrant in the pleadings. Hence, to that extent, there is error of law apparent on the face of the decree, and it is such an error as might readily be corrected by a bill of review if the decree had been pronounced by the Chancellor, but not so having been pronounced by a Court of last resort, against which, as already seen, a bill of review, as such, will not lie for any reason or purpose.

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However, though self-named a bill of review, and being such in form, the present bill is more, in substance and effect as to one of its items, than a mere bill of review, and not being restricted by its name (*Arnold v. Moyers*, 1 Lea, 308), the Courts will interpret and apply its allegations in their other and broader scope to meet the ends of justice. That other and broader sense or meaning of the allegations in reference to the item of \$1,250 is that the decree, to that extent, is beyond and against the pleadings, and, therefore, void. So viewed, the bill as to that item may well be entertained as an original bill to annul and vacate a decree because *coram no judice*; and this is true in reference to the decree of any Court. Such a decree by this Court is subject to the same impeachment by such a bill as a like decree of the Chancellor, being invalid wherever rendered. *Randolph v. Bank*, 9 Lea, 63.

Reverse and remand as to the \$1,250 item and affirm as to the \$1,000 item.

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JOHNSON v. MURPHY.

(*Knoxville.* October 11, 1901.

WRIT OF ERROR. *Does not lie, when.*

Writ of error does not lie to obtain re-examination of a decree rendered by the Chancery Court pursuant to the mandate of this Court upon remand of a cause.

FROM JEFFERSON.

Appeal from Chancery Court of Jefferson County.
JOHN P. SMITH, Ch.

PARK & PARK for Johnson.

PICKLE & TURNER, EUGENE HOLTSINGER and C.
A. FRAME for Murphy.

CALDWELL, J. C. H. Johnson and others, next of kin of W. C. Newman, deceased, filed this bill against J. D. Murphy, administrator, and the sureties on his bond, for a settlement of the estate. On appeal, the Supreme Court rendered a decree in favor of the complainants for \$5,285.09 and remanded the cause for collection thereof and distribution among those entitled. Thereupon decree was entered in the lower Court, in accordance with the

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procedendo, and the defendants sued out this writ of error.

A writ of error will not lie in such a case, otherwise the litigation might become endless. If it will lie after one remand it will lie after another, and another, and so on, without limit, and the execution of the decree of this Court, through a *procedendo* to the lower Court, may by that means be made practically impossible.

Dismiss the writ.

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BRYANT v. BANK.

(*Knoxville*. October 14, 1901.)

1. VENDOR'S LIEN. *Priority of.*

An assignee of purchase price notes possesses a lien on the land for which they were given superior to the attaching creditor of the vendee or assignor, where, before levy of the attachment upon the land, by agreement of the parties to the deed and the assignee of the notes, there had been inserted in the deed, which originally contained no such stipulation, a clause creating a vendor's lien to secure the notes; and it is immaterial whether this clause was inserted as a correction of the deed or as a new contract, or whether the deed was registered after its insertion. (*Post*, pp. 561-567.)

2. REGISTRATION. *Its effect.*

Registration laws fix and regulate the rights of creditors of the vendor, and of purchasers from him, but have no application to creditors of the vendee. The vendor's creditors may defeat the vendee's title by attachment of the land before registration of the deed, but the vendee's creditors would secure, by such attachment, only such interest as the vendee actually had in the land at the date of the attachment. (*Post*, pp. 564, 565.)

Code construed: § 3752 (S.); § 2890 (M. & V.); § 2075 (T. & S.).

Cases cited: *Leech v. Hillsman*, 8 Lea, 747; *Colyar v. Bank*, 103 Tenn., 723.

3. DEED. *Not vitiated by subsequent interlineations.*

A deed is not vitiated by the insertion, in good faith and by consent of parties, of a clause providing for a vendor's lien, made after its execution and registration, especially when such clause is inserted to cure an omission, made by accident or mistake, from the original instrument. (*Post*, pp. 566, 567.)

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4. SAME. *Acknowledgment of, required, when.*

After change of a registered deed re-acknowledgement is required to authorize its re-registration. (*Post*, pp. 567.)

FROM BRADLEY.

Appeal from Chancery Court of Bradley County.
T. M. McCONNELL, Ch.

SMITH & TRAYNOR for Bryant.

JOHN C. RAMSEY for Bank.

BEARD, Ch. On September 23, 1895, T. E. Bryant, who was the owner of a ninety-five acre tract of land, lying in Bradley County, by a deed duly executed, acknowledged, and delivered, conveyed it to one C. L. Carmack, and as a consideration for the same received from the grantee a payment in cash and his four promissory notes, maturing one, two, three, and four years after date. In this deed the wife of T. E. Bryant joined for the purpose of relinquishing all homestead right in the land conveyed.

The present bill is filed by the complainants, who are the owners of these notes by assignment from the payee, T. E. Bryant, against the Bank of Charleston, which, at the time of its filing, was proceeding to the execution of a decree for sale, pronounced

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in a cause which it had successfully prosecuted against the vendee, Carmack. The claim of complainants is that these purchase money notes were unpaid; that they were secured by an express lien retained in the face of the deed to Carmack; that the bank decree for sale was rested upon an attachment issuing out of the Chancery Court in a cause instituted against Carmack and levied on this as his property, while it was yet subject to this unsatisfied lien, and the prayer of the bill was that their claim as preferential lien creditors be established by decree.

The defense set up by the bank is that, at the time of the delivery of the deed by the Bryants to Carmack, the vendor failed to make any reservation of a lien to secure the payment of these notes, but that afterwards when Carmack, the vendee, fell into financial trouble, and the bank and other creditors were either pressing him, or threatening to do so, these complainants and Carmack entered into a fraudulent agreement by which there was interpolated a clause reserving this express lien, and that, without other or further acknowledgement upon the part of the grantors, the deed, with this interpolation, was registered. Within a day or two after this was done the bank filed its bill, and suing out a writ of attachment, caused it to be levied on this property as that of their debtor, Carmack.

The facts on the issue thus raised, as found by the Court of Chancery Appeals, are, that it was the

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distinct agreement between the vendor, T. E. Bryant, and the vendee, Carmack, at the time of the sale and purchase of this property, that the notes executed as a consideration therefor, and now held by these complainants, should be secured by a lien retained on the face of the deed, and the draughtsman was directed to insert a stipulation to that effect, but failed to do so; that upon the assumption that the deed was drawn as ordered, it was signed, acknowledged, and delivered by the makers to Carmack; that thereafter, upon Carmack becoming involved in business troubles, one of the parties interested in one of the notes was in some way prompted to an investigation, with a view of ascertaining the condition of this deed, when it was discovered in the vendee's hands unrecorded, and lacking this important stipulation; that thereupon the holders of the notes and Carmack, agreeing that it was proper to write into the deed this omitted stipulation, took it to the draughtsman, who, at the suggestion of Carmack and complainants and upon the express authority of the vendor, T. E. Bryant, interlined it therein, and that thus altered without any re-acknowledgment, it was taken to the office of the Register and by him was duly noted for registration; that Court further finds that this alteration was made in good faith by these parties, and with the sole view of making the instrument speak the real contract of the parties thereto.

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Under these facts the question is, Have these complainants a lien on the tract of land superior to the lien of the bank acquired under its attachment? There is no doubt if, at the time of the execution of the deed to Carmack, the vendor had inserted a clause reserving to himself a lien to secure the payment of the purchase money notes, that the subsequent attachment of the bank would have been subject to this lien, and this, whether the deed had or had not been registered. For it is well settled that the registration laws "only fix the rights and give preference to existing or subsequent creditors or *bona fide* purchasers of and from the makers of the deed. They do not profess to, nor do they in fact refer to, or regulate the rights of the creditor" of the grantee in a deed. *Leech v. Hillsman*, 8 Lea, 747. It is true, land held by an unregistered deed may be levied upon by execution and attaching creditors of the vendor and vendee respectively. But very different results follow in the two cases. As to the execution and attaching creditors of the maker, a deed is null and void for lack of registration (§ 3752 Shannon's Code), but it is otherwise as to those of the vendee. The rights of these creditors are not fixed by our registry acts, but depend upon rules established outside of and independent of these acts. One of these rules, and the one now pertinent, is that the rights of the creditor can rise no higher than those of his debtor. And this rule is generally true whether the deed be reg-

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istered or not. While the creditor may appropriate his "debtor's property to the payment of his debts, except so far as the law, as a matter of public policy, has exempted it from seizure, he has no claim or equity in sound reason or law to subject anything which the creditor did not own." So in a case where one conveyed his land to another by an instrument which upon its face was an absolute deed, but which was intended as a mortgage, and while in this condition it was levied upon and sold as the property of the conveyee, it was held that the execution creditor who purchased at this sale stood in the shoes of the mortgagee, and held it subject to the mortgagor's right to a reconveyance. *Leech v. Hillsman, supra*. To like effect is *Colyar v. Bank*, 103 Tenn., 723.

There is no question but that upon the discovery of the discrepancy between the deed as drawn and the agreement of the parties, that upon the refusal of Carmack or of the vendor to correct the instrument so that it might conform to this agreement, that the present complainants might have filed their bill in equity, and upon the facts found in this record they would have been entitled to a decree for reformation. This right to reformation, upon the authority of the text of Mr. Jones, in his work on Mortgages, Vol. 1, Sec. 99, might have been asserted, as against any one standing below a *bona fide* purchaser, without notice. According to this author, it might "be reformed as against a junior

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mortgagee, whose mortgage was taken without notice of such a mistake as security for an antecedent debt, without the surrender of any old security and without any new consideration moving from him." The mistake might be "corrected, too, against a subsequent judgment creditor, but not against a purchaser of a subsequent judgment, who has invested his money in the purchase of the judgment upon the faith of an apparent lien upon the land. The equity of the mortgagee is regarded as stronger than that of the judgment creditor, who has not probably parted with his money on the faith of the apparent facts."

If a Court of equity could have preserved the rights of these complainants upon a proper bill filed against the vendor and vendee, one or both being recusant, why may they not be made equally secure by voluntary action of all parties in interest? It is difficult to see, and certainly no good reason has been furnished in argument, why this might not be done; that this interlineation, made in good faith, by the consent of the parties interested, so as to make the instrument speak the real contract, does not invalidate it, is well sustained by authority. *Malarin v. U. S.*, 1 Wall, 282; *Doe v. McArthur*, 2 Hawk (N. C.), 33 (S. C., 11 Am. Dec., 738); *Wooley v. Constant*, 4 John., 54 (S. C., 4 Am. Dec., 246); *Bassett v. Bassett*, 55 Me., 125; *Prettyman v. Goodrich*, 23 Ill., 330; *Stiles v. Probst*, 69 Ill., 382. And certainly the Bank of Charleston,

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a subsequently attaching creditor, was not injured by it, and cannot be heard to complain, whether the alteration took effect by relation from the date of the instrument or from the time it was made. It is true that this alteration of the deed destroyed the efficacy of the former acknowledgment, and that without a new acknowledgment it was not entitled to be noted for registration; but, as before seen, this is immaterial so far as the creditors of the vendee are concerned.

It is unnecessary here to determine the effect of this subsequent change in the frame of the deed so far as the homestead right of the wife is concerned, inasmuch as she was not consulted with regard to nor in any way gave her consent to it.

The decree of the Court of Chancery Appeals is affirmed.

Gorrell v. Taylor.

GORRELL v. TAYLOR.

(*Knoxville*. October 17, 1901.)

1. PARENT AND CHILD. *Services of child for parent presumed gratuitous.*

Attentions and services rendered by a child, while living with the parent, during the latter's ill-health, though long continued, are presumed to have been gratuitously rendered from motives of affection and duty, and to entitle the child to recover compensation therefor, he must overcome this presumption by a preponderance of evidence showing either an express contract or such exceptional facts and circumstances as establish an intention on the one part to charge, and on the other to pay for same notwithstanding the relation of kinship.

Cases cited: *Forsee v. Matlock*. 7 Heis., 425; *Taylor v. Lincumfelter*, 1 Lea, 83; *Hayes v. Cheatham*, 6 Lea, 9.

2. SAME. *Same.*

The same rule applies to services and attentions rendered by the husband or wife of a child as to those rendered by a child.

3. SAME. *Same.*

And this presumption applies to services rendered by persons in more remote degrees of relationship than that of parent and child, but grows weaker as the degree of relationship grows more remote.

FROM COCKE.

Appeal from Chancery Court of Cocke County.
JOHN P. SMITH, Ch.

Gorrell v. Taylor.

W. H. JONES for Garrell.

H. N. CATE for Taylor.

CALDWELL, J. The complainants are the daughter and son-in-law of P. Taylor, deceased. They brought this bill against his executors to recover \$1,600 and \$500 respectively for services rendered to him during a long period of ill health, which continued until his death. The Chancellor denied the complainants the relief sought, and the Court of Chancery Appeals affirmed his decree. The substance of the facts found by the latter tribunal, very briefly stated, is that the deceased was in very feeble health for many years prior to his death, though not generally confined to his bed or house; that, while he employed all servants needed to perform the ordinary labor in and about his home, his daughter, one of these complainants, lived with him and cared for him tenderly and affectionately, rendering him with her own hands those more delicate, personal, and comforting services which are essential to the welfare of a sick person, for about seventeen years; that her co-complainant, after their intermarriage and up to the death of her father, some four years thereafter, likewise lived with him and assisted in the rendition of those services, but that the decedent, notwithstanding his evident appreciation of the kind and helpful attention of the complainants, never promised or expected to compensate them therefor. Upon that finding of facts the Court of

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Chancery Appeals rightly adjudged that the complainants had failed to make out a proper case for recovery.

Children performing services of this character for a parent are presumed to act gratuitously, from motives of affection and duty, and to entitle them to recover compensation therefor, the burden is upon them to overcome the presumption by showing either an express contract or such exceptional facts and circumstances as will establish an intention on the one part to charge and on the other to pay, notwithstanding the relation of kinship. *Forsee v. Matlock*, 7 Heis., 425; *Riley v. Riley*, 38 W. Va., 290; approved in *Plate v. Durst* (W. Va.), 32 L. R. A., 406; *Ulrich v. Ulrich* (N. Y.), 18 L. R. A., 38; *Weir v. Weir*, 3 B. Monroe, 645 (S. C., 39 Am. Dec., 487); *Poorman v. Gilgore*, 26 Pa. St., 365 (S. C., 67 Am. Dec., 524); *Dodson v. McAdams*, 96 N. C., 140 (S. C., 60 Am. Rep., 408). And the presumption of gratuitous service goes beyond the real blood relation of parent and child. It extends to stepchildren (*Williams v. Hutchinson*, 3 Comstock, N. Y., 312 (S. C., 53 Am. Dec., 301; *Ellis v. Cary*, Wis., 4 L. R. A., 55); to grandchildren (*Dodson v. McAdams*, *supra*); to brother and sister (*Taylor v. Lincumfelter*, 1 Lea, 83; *Hayes v. Cheatham*, 6 Lea, 9), and, indeed, to all relatives living together in the same family; but it naturally grows weaker, and, therefore, becomes more easily rebutted as the relationship recedes.

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This presumption, which, from the very reason underlying it, must obviously reach its highest and strongest point in the case of a child, quite as certainly and but little less strongly affects the claim of the son-in-law or daughter-in-law, who joins the other marital partner in filial services to the latter's parents. In fact, no distinction was taken between the two in *Forsee v. Matlock*, *supra*, where the son-in-law joined his wife in attentions to her father, nor in *Ulrich v. Ulrich*, *supra*, where the daughter-in-law joined her husband in caring for his mother; but, in each instance, they were treated as upon the same footing. The presumption was applied against the husband, who was the son and only plaintiff in the latter case, and also against the husband, who was the son-in-law and only plaintiff in the former case.

Propositions announced in this opinion are likewise sustained by numerous other authorities, among them 17 Am. & Eng. Enc. L., pp. 336 to 344 inclusive, and cases there cited.

The presumption of gratuitous service arose as to both of these complainants, the son-in-law as well as the daughter of the deceased, and, that presumption having been overcome as to neither of them, both must be denied a recovery.

Affirm.

Stephens v. Ozbourne.

STEPHENS v. OZBOURNE.

(*Knoxville*. October 19, 1901.)

RESCISSION. *Clear case for.*

Where an illiterate negro, ignorant of the facts as to his title to property and of its value, is induced by a person having full knowledge of the facts, but intentionally suppressing them, to convey to such person real estate worth \$1,000 for a consideration of \$5.00, the vendor has a clear case for rescission for fraud. In such case the inadequacy of price is so gross as to shock the conscience and afford evidence of fraud. Besides, the suppression of facts by the purchaser constitutes fraud under the circumstances.

Cases cited: *Wright v. Wilson*, 2 Yer., 294; *Birdsong v. Birdsong*, 2 Head, 290; *Coffee v. Ruffin*, 4 Cold., 507; *Hamilton v. Saunders*, 3 Shan. Cas., 789; *Mann v. Russey*, 101 Tenn., 598; *Talbot v. Manard*, 106 Tenn., 69.

FROM KNOX.

Appeal from Chancery Court of Knox County.
JOSEPH W. SNEED, Ch.

FRANTZ & WRIGHT and McCROSKEY & PEACE for
Stephens.

SANSOM, WELCKER & PARKER for Ozbourne.

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CALDWELL, J. The bill in this cause was brought to annul and cancel a deed for fraud in procuring it. The Chancellor granted the relief sought and the Court of Chancery Appeals affirmed his decree.

The complainant, George Stephens, an ignorant old negro man, residing in the State of Georgia, executed the deed in question to the principal defendant, Mrs. M. M. Ozbourne, an intelligent white woman of Knoxville, Tenn., and thereby he conveyed to her, for the consideration of \$5, a piece of real estate in Knoxville worth \$1,000. The transaction, on the part of the vendee, was conducted by her agent, who, knowing the value of the property, its former ownership, and facts strongly indicating present ownership in the vendor, visited him in Georgia and brought the question of ownership and of sale to his attention simultaneously and for the first time; and thereupon, after confirmation in his own mind as to the identity of the true owner, the agent, upon the statement that the property was "worth some money if the right parties could be found," and without further disclosure induced the old darkey, who had no other information on the question of value or ownership, then and there to execute the deed as the "only living heir" of his father, who the agent knew really owned the lot at the time of his death many years before.

This condensed narration of the elaborate finding of facts by the Court of Chancery Appeals discloses two obvious reasons for the cancellation of the deed:

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First, such gross inadequacy of price as to shock the conscience and establish fraud, and, second, such suppressive and misleading conduct on the part of the vendee's agent as, under the circumstances, was fraudulent in itself; and when the two things are combined the fraud becomes absolutely overwhelming.

It is everywhere agreed that simple inadequacy of consideration, a mere undervaluation without more, raises no presumption of fraud, nor affords any reason for the avoidance of the contract by rescission, cancellation, or otherwise; but when the disparity between the true value of the thing sold and the price paid, or to be paid, reaches the extremity just indicated; or when the situations of the contracting parties are, for any reason, so unequal as to give one a great advantage, which, through nondisclosure and deception, he makes available to the detriment of the other; or when even a less difference as to consideration and less inequality in environments conspire together in producing a hard bargain, a court of equity will be prompt to give the fullest measure of relief on the ground of fraud.

After saying that inadequacy of consideration is not, of itself, a distinct doctrine of relief in equity, Judge Story continues: "Still, however, there may be such an unconscionableness or inadequacy in a bargain as to demonstrate some gross imposition or some undue influence, and in such cases courts of

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equity ought to interfere upon the satisfactory ground of fraud. But then such unconscionableness or such inadequacy should be made out as would (to use an expressive phrase) shock the conscience, and amount in itself to conclusive and decisive evidence of fraud. And where there are other ingredients in the case of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud." Story's Eq. Jur., Sec. 246.

The same language (omitting the last sentence) is used by the Supreme Court of the United States in *Eyre v. Potter*, 15 How., 60.

Mr. Pomeroy says: "Although the actual cases in which a contract or conveyance has been canceled on account of gross inadequacy merely, without other equitable incidents, are very few; yet the doctrine is settled by a consensus of decisions and *dicta* that, even in the absence of all other circumstances, when the inadequacy of price is so gross that it shocks the conscience and furnishes satisfactory and decisive evidence of fraud, it will be sufficient ground for canceling a conveyance or contract whether executed or executory." 2 Pom. Eq. Jur., Sec. 927.

Though of no special importance in the decision of the present case, it should be observed in passing that Mr. Pomeroy substitutes the word "satisfactory" for the word "conclusive," used by Judge

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Story in the phrase, "conclusive and decisive evidence of fraud," the reason for the substitution being given at length in a note on the next page.

In Sec. 928, Mr. Pomeroy further says: "If there is nothing but mere inadequacy of price, the case must be extreme in order to call for the interposition of equity. Where the inadequacy does not thus stand alone, but is accompanied by other inequitable incidents, the relief is much more readily granted. . . . When the accompanying incidents are inequitable and show bad faith, such as concealments, misrepresentations, undue advantage, oppression on the part of one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other, these circumstances combined with inadequacy of price may easily induce a Court to grant relief defensive or affirmative."

The general principles thus announced by these and other distinguished authors, and applied by this Court in *Wright v. Wilson*, 2 Yer., 294; *Birdsong v. Birdsong*, 2 Head, 290, 294; *Coffee v. Ruffin*, 4 Cold., 507; *Hamilton v. Saunders*, 3 Shann. Cas., 789; *Mann v. Russey*, 101 Tenn., 598; *Talbot v. Manard*, 106 Tenn., 69, and elsewhere, are so thoroughly established in English and American jurisprudence that it would, indeed, be a work of supererogation to discuss, or even cite, the multitude of adjudged cases in which one or more of them have been the basis of equitable relief. A large

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array of the cases is found in a critical note in 1 Am. & Eng. Dec. in Eq., 202 to 204 inclusive.

The transaction developed in the present case will stand none of the tests suggested, but inevitably falls before at least two of them. It unmistakably comes under condemnation for the grossest inadequacy of price—\$5, for property worth \$1,000—and also for the suppressive and misleading statement that the property was “worth some money if the right parties could be found,” when the agent making that statement and getting the benefit for his principal knew the true value, and that he was addressing the right party, and that the latter was an ignorant old negro, with only such information in reference to the ownership and value of the property as he, the agent, had importated.

Lord Thurlow, in the oft-quoted case of *Gwynne v. Heaton*, 1 Bro. Ch., 1–9, defines the inadequacy of price which in and of itself will establish fraud and justify relief, as follows: “An inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it.” The present transaction completely fills the requirements of that very extreme definition. Land worth \$1,000 bought for \$5, or at one-half of one per cent. of its value! What man of common sense, upon hearing the statement, would not be forced to exclaim at the “inequality” and also at the *iniquity* of it.

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In the early case of *Wright v. Wilson*, 2 Yer., 294, this Court set aside a sale for gross and shocking inadequacy of price when land worth \$500 or \$600 was sold for \$50, making an inequality of ten or twelve to one. That case, the Court remarked, fell within the principle announced by Lord Thurlow, in *Gwynne v. Heaton*, *supra*, and applied in other English cases, where the disproportion was as one to two and as four to five respectively.

It is of no consequence, so far as the result is concerned, that this vendee had no personal connection with this purchase. What she did by her agent she did by herself in legal contemplation. His acts, for the purpose of this litigation, are imputable to her in the fullest sense. She cannot deny legal responsibility for those acts and at the same time hold the fruits of them.

Affirm and remand for an account, in which the complainant will be charged with the \$5, all proper taxes paid by the vendee, and with permanent improvements if any, by her, and credited by rents and profits.

Chumbley v. Bowman.

CHUMBLEY v. BOWMAN.

(*Knoxville*. October 19, 1901.)

APPEAL BOND. *Surety's liability.*

Decree for the full amount goes against the surety on an appeal bond upon affirmance of a money decree against his principal, although the latter has succeeded by his appeal in obtaining a modification of the decree appealed from, so far as to postpone his liability to that of a co-defendant who did not appeal.

FROM KNOX.

Appeal from the Chancery Court of Knox County.
JOS. W. SNEED, CH.

INGERSOLL & PEYTON for Chumbley.

J. E. JOHNSTON for Bowman.

WILKES, J. In this cause, there was a decree in the Chancery Court of Knox County against Kincaid and Bowman jointly for \$800 and costs. From that decree Bowman alone appealed, giving bond in the sum of \$1,000, with N. T. Little, surety, conditioned for the successful prosecution by Bowman of his appeal, and failing therein to pay the amount adjudged against him in said decree, with interest,

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damages, and cost, and to satisfy any decree rendered against him in this Court.

The Court of Chancery Appeals affirmed this decree, with the modification that Kincaid's property should be first exhausted, and then the remainder should be made from Bowman, and judgment was accordingly entered, and the cause remanded for further proceedings.

From so much of the decree as failed to include N. T. Little, the surety on the appeal bond in the judgment, complainant prayed an appeal, and assigns as error that the judgment should have been against Little, as the surety of Bowman on his bond, as well as against Bowman, the principal, for the same amount.

We think this assignment is well made. The judgment against the surety should follow that against the principal, and the latter did not prosecute his appeal, except with partial success, and the surety will receive the benefit of that. The judgment will be modified accordingly, and in all other respects not being questioned it is affirmed.

Keneval v. State.

KENEVAL v. STATE.

(*Knoxville*. October 19, 1901.)

1. BIGAMY. *Unlawful cohabitation separate offense.*

Cohabitation in this State with the wife of a bigamous marriage had in another State is not bigamy, but is declared a distinct felony by statute. (*Post*, p. 582.)

Code construed: § 6760 (S.); § 5649 (M. & V.); § 4839 (T. & S.).

Case cited: *Finney v. State*, 3 Head, 545.

2. SAME. *Same.*

Cohabitation in this State with the wife of an alleged bigamous marriage had in another State does not constitute a felony within our statute where it appears that the alleged first marriage, which was supposed to render the later marriage bigamous, was itself illegal, bigamous, and void. (*Post*, pp. 582-584.)

Code construed: § 6760 (S.); § 5649 (M. & V.); § 4839 (T. & S.).

Case cited: *Bashaw v. State*, 1 Yer., 186.

3. INDICTMENT. *For bigamous cohabitation in this State.*

While an indictment for bigamous cohabitation in this State, under color of an illegal marriage had in another State, is, perhaps, sufficient, without averring the name of the first wife, or date or place of the first marriage, still, if these facts are specifically averred, they must be proved as averred and cannot be rejected as surplusage. (*Post*, pp., 584, 585.)

4. CRIMINAL PRACTICE. *Not guilty.*

It is not error to strike out defendant's special plea in a criminal case if he can have, and especially if he has actually had, the benefit of the same matter of defense under this general plea of not guilty. (*Post*, pp., 583, 584.)

5. SAME. *Admission of evidence.*

Relevant facts proved on behalf of defendant by an incompetent witness, or by informal deposition or by secondary evidence,

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with the consent of the Attorney-general, or admitted without objection on his part, cannot be objected to by the State and excluded in this Court. (*Post pp. 585-587.*)

FROM KNOX.

Appeal in error from Circuit Court of Knox County. Jos. W. SNEED, J.

TEMPLETON & CARLOCK for Keneval.

Attorney-général PICKLE for State.

WILKES, J. The defendant is convicted under the statute, Shannon, Sec. 6760, of the particular form of bigamy which consists of cohabiting with a second wife in this State, the defendant having been married the second time in another State. This is an offense distinct from bigamy proper under the statute. *Finney v. State*, 3 Head, 545. His punishment was assessed by the jury at eight years in the State penitentiary, and he has appealed.

Several objections are made to the proceedings, and are assigned as errors. We need notice only one. The indictment alleges that the defendant was married to Clementine Hacker on February 11, 1899, and the marriage was still subsisting on January 3, 1900, when he was married for the second time to Annie Meade Holmes, in Kentucky, and that he

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lived, dwelt, and cohabited with Annie Meade Holmes as his wife in Knox County from the date of his marriage to her until indictment found; the defendant well knowing that Clementine Hacker was then alive and had not been divorced from him. The defendant filed a special plea that the alleged marriage with Clementine Hacker was void and a nullity, because he was, when married to her, already a married man, having been married to one Bessie Heiner in 1892, in Chicago, Illinois, and the marriage to the latter was still subsisting at the date of the marriage to Clementine Hacker. This special plea was demurred to, and a motion was made to strike it out, which was sustained upon the ground that the matter set up in the special plea might be given in evidence under the general issue of "not guilty."

The Court did not in his charge allude to the matter set up in this plea, and afterwards relied on under the general issue. After his charge was delivered he was requested to say to the jury, "Before the defendant can be convicted under the indictment in this case, the proof must show beyond a reasonable doubt that the prior marriage to Clementine Hacker set out in the indictment was a valid, legal marriage. If the proof raised a reasonable doubt on that point, or if the jury believe from the proof that said alleged marriage to Clementine Hacker was void, then it will be the duty of the jury to return a verdict of "not guilty" under this indict-

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ment.” And again, “If the deposition of marriage to Bessie Heiner in 1892 shows that she is still living and wife of defendant, that would make any subsequent marriage void.” These requests were refused. We think there was no error in striking out the special plea setting up this defense, as it is one proper to be made under the general issue of not guilty. In any event, the defendant had the benefit of the defense as fully as if the plea had been sustained, and if there was error it was harmless.

We are of opinion the special charges and instructions asked should have been granted and given. If defendant was already lawfully married when he entered into the marriage relation with Clementine Hacker, then the marriage to her was bigamous, illegal, and void. It was perhaps not necessary in the indictment to set out the name of the former wife and the time and place of marriage to her. Upon this proposition the authorities are divided. 3 Enc. Pl. & Pr., 325, 326. But if the name of the former wife and time and place of marriage are set out in the indictment, the proof must correspond with the charge made, as in other cases. 3 Enc. Pl. & Pr., 327.

The indictment in this case being based upon a prior legal marriage of defendant with Clementine Hacker, such marriage must be a legal one, and if it is shown that it is not legal, an indictment and conviction based upon it cannot be sustained. *Ba-*

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shaw v. State, 1 Yer., 186, 187; *Kopke v. The People*, 43 Mich., 41.

If the marriage to Clementine Hacker was itself bigamous, the defendant may be convicted of that under proper indictment so alleging, but cannot be under this indictment, which charges the contrary, to wit: a valid marriage to Clementine Hacker.

There can be no conviction for bigamy under an indictment alleging that defendant married H., and that thereafter, while she was his wife, he married C., when it appears that at the time of his marriage to H. he had a wife living and not divorced, such marriage being void. *People v. Corbett*, 63 N. Y. State, 460.

Bigamy cannot be predicated of a second marriage when the first marriage alleged is void. *Riggs v. State*, 55 Ala., 108.

It is virtually conceded by the State that these are correct propositions of law, but it is said there is no competent evidence to prove that the marriage to Bessie Heiner, in Chicago, previous to the marriage to Clementine Hacker, was a legal and valid one. The deposition of Bessie Heiner, the alleged legitimate and lawful wife, was taken, and read without objection to the whole or any part of it. She states that she was married to the defendant February 25, 1892, at the Presbyterian rectory in Chicago, Ill. She was asked to file with her deposition a full and true copy of her certificate of marriage, if she had one or could procure one.

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She answered: "In lieu of such a copy, *I state, by consent*, that such a marriage certificate does exist, and has on it proper and legal return, showing my marriage to J. W. Keneval, this defendant, in February, 1892, the certificate being a license under the laws of Illinois, and the return of Thomas C. Hall, a minister of the gospel;" that she afterwards lived with him as his wife and was still his wife.

Annexed to this deposition, which does not appear to be signed or sworn to, and to which no certificate of the officer taking it appears there is this statement, "No objection will be made at the trial to answer No. 4 as to competency or relevancy," and this is signed by the District Attorney-general and attorneys for the defendant. This is put into the record by bill of exceptions as the evidence and only evidence of defendant, and as before stated, was not objected to on any ground whatever. Interrogatory No. 4 and the answer thereto embodied the statement heretofore set out that, instead of filing a true copy of the witnesses' certificate of marriage, *she stated by consent* that such certificate existed, and had on it proper and legal return, showing her marriage to defendant, etc. It thus appears that this evidence was admitted without objection to part, if not all of it, by the consent of the District Attorney-general, and was read and relied on by defendant in the Court below, and he cannot now be prejudiced by its withdrawal for incompetency. We are of opinion that the illegality of the marriage of

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defendant to Clementine Hacker is sufficiently shown under the peculiar record in this case, and this being so, the subsequent marriage to Annie Meade Holmes is not bigamous, and the charge in this indictment is not, therefore, sustained.

The judgment of the Court below is reversed and cause remanded for a new trial.

Davis v. Rogersville.

DAVIS v. ROGERSVILLE.

(*Knoxville.* October 26, 1901.)

1. MUNICIPAL BONDS. *Valid election for issuance of.*

By an Act, approved April 22, 1901, the town of Rogersville was required to submit to the qualified voters of that town, within ninety days from that date, a proposition for the issue of \$2,500 city bonds for certain purposes. By another Act, passed at the same session and approved April 18, 1901, the registration and election laws were amended, and made to include for the first time the town of Rogersville. Neither Act made any provision for a special registration of the voters of the town for this election, and the election, which was required to be holden before a general registration could be had under the general election laws, was held without registration, and without compliance with the "Dortch law." *Held:* The election was properly held under the old law, and the proposition had been approved by the required majority, and bond issue can be validly made.

Acts construed: Acts 1901, Chs. 147, 341.

2. ELECTIONS. *Registration for.*

Registration of voters in the town of Rogersville for this particular election was not authorized within the limited period allowed by the statute for holding it, by the general provisions of the election or registration laws authorizing registration of voters for special or other elections.

FROM KNOX.

Appeal from Chancery Court of Knox County.
Jos. W. SNEED, Ch.

Davis v. Rogersville.

SMITH & MARGRAVES for Davis.

HUFFMASTER & CHESTNUT for Rogersville.

WILKES, J. On April 19, 1901, the General Assembly passed an Act authorizing the town of Rogersville to issue coupon bonds to an amount not exceeding \$2,500, for the benefit of McMinn Academy. The council was empowered to submit the question of issuance to the qualified voters of the town within ninety days after the passage of the Act. The Act was approved April 22, 1901. An election was held July 10, 1901, and the proposition carried by a vote of sixty-four for and six against it. On April 17, 1901, the General Assembly passed an Act extending the provisions and operations of the Dortch and registration laws to Rogersville and other towns of its size which had not previously been subject to these laws.

On August 19, 1901, the bill in this cause was filed, enjoining the issuance of the bonds on the ground that the election was illegal because not held under the provisions of these laws. The Chancellor held the election legal. The Court of Chancery Appeals held it illegal, and that it should have been held under the Dortch and registration laws, and the defendants have appealed, and present the single question whether the election should have been held under the Dortch and registration laws or under the election laws existing prior to April 17, 1901, when these laws were extended to Rogersville. The con-

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tention is that no general registration could be had under law until August, 1901, and before that time the ninety day limit for holding the election fixed by the Act would expire; that, as a matter of fact, no registrars were appointed, and the machinery of the new law was not put in motion until after the time for holding the election had expired, and it must therefore have been the intention of the Legislature that the election should be held under the old law.

The Court of Chancery Appeals answers these contentions by saying that while August is the time appointed for general registration, still the law provides for a registration of voters for any election at any time, and to that end the books shall be kept open for three days for such registration, and close twenty days before the election, and the registrars shall, upon personal application of voters, register such voters as have not previously registered, and re-register those who have changed their residence, and that, under these provisions, the voters could have been registered and the election held under the new law; that it was the duty of the commissioners immediately on the passage of the Act to appoint the registrars, and their failure to do so would not authorize an election under the old law.

We are of opinion that no legal election could have been held under the Dortch and registration laws within the time limited by the Act, of ninety days from April 19. The registration could not oc-

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cur until August thereafter. The provision cited by the Court of Chancery Appeals for opening the books for three days before any election is designated only to supplement the general registration, and let in those who had not been included in the general registration or had changed residence. It is not to be presumed that the Legislature was ignorant or unmindful of the fact that no election under the new law could be had in the time limited, and hence, in providing for an election, it must have been intended that such election should be held under the law previously in force.

We are of opinion that the Court of Chancery Appeals was in error, and that the decision of the Chancellor was correct, and it is affirmed and decree of the Court of Chancery Appeals is reversed. Complainants will pay all costs.

McClung v. Colwell.

McCLUNG v. COLWELL.

*(Knoxville. October 26, 1901.)*1. CORPORATIONS. *Pledges of shares of stocks.*

A pledgee, to whom shares of stock have been assigned and delivered as collateral security, is secure against the pledgor and his creditor without transfer of same on the books of the corporation. (*Post*, p. 600.)

Case cited: *Parker v. Bethel Hotel Co.*, 96 Tenn., 274.

2. SAME. *Same.*

A pledgee of shares of stock may constitute and appoint the pledgor, in whose name the shares stand on the books of the company, his agent to sell, exchange, or otherwise dispose of same for the pledgee's benefit. (*Post*, pp. 598, 599.)

Cases cited: *Johnson v. Smith*, 11 Hum., 400; *Wharton v. Laverder*, 14 Lea. 188; *Grange Warehouse Co. v. Owen*, 86 Tenn., 355.

3. SAME. *Same.*

The pledgor's creditors acquire no right or interest by attachment of shares of stock before their delivery to the pledgee, which the pledgor had, as the pledgee's agent, taken in exchange for other pledged shares, under an agreement that they should stand in the room and stead of the former pledged shares, even though the shares were issued and stood in the pledgor's name. (*Post*, pp. 593-600.)

Cases cited: *Young v. South Tredegar Iron Co.*, 85 Tenn., 189; *Cates v. Baxter*, 97 Tenn., 447.

4. RESULTING TRUST. *Applies to personalty.*

Where shares of stock are issued or assigned to one person a trust will result in favor of another person who advances the consideration in whole or in part. (*Post*, pp. 600-602.)

McClung v. Colwell.

Cases cited: Sayles v. Cox, 95 Tenn., 579; Arbuckle v. Kirkpatrick, 98 Tenn.. 221; Cornick v. Richards, 3 Lea, 1; Bank v. Baker, 8 Hum., 447.

FROM KNOX.

Appeal from Chancery Court of Knox County.
JOSEPH W. SNEED, Ch.

GREEN & SHIELDS for McClung.

WEBB, McCLUNG & BAKER for Colwell.

McALISTER, J. Complainants, as creditors of B. S. Colwell, are seeking by this attachment bill to subject to the satisfaction of their claims 165 shares of stock in the Southern Car and Foundry Company, standing in the name of the defendant, B. S. Colwell. The attachment was levied on the stock while in the hands of defendant, W. P. Chamberlain, and notice of the attachment given to Colwell and the Southern Car Company. On May 14, 1901, J. D. Case intervened in said cause by petition, asserting title to said stock under a pledge made to him by defendant, Colwell. Case, it appears, had become the indorser of Colwell on notes amounting to \$5,070, and to indemnify Case, Colwell had delivered to him, as collateral security, ninety shares of the preferred stock of the Lenoir Car Company, represented by nine certificates each for ten shares.

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Some of these shares Case had held for some time prior to that date. All of these certificates had been properly indorsed by Colwell and delivered to Case. It further appears that, in December, 1900, the Lenoir Car Company was consolidated with the Southern Car and Foundry Company, and new stock was issued by the Southern Car and Foundry Company in lieu of stock of the Lenoir Car Company.

The Court of Chancery Appeals found that Colwell had informed Case of the proposed exchange, and the latter agreed that the stock which Case held as collateral security should be exchanged for new stock in the Southern Car and Foundry Company, into which the Lenoir Car Company had become merged. It was agreed between Colwell and Case that the 165 shares of preferred stock, to be issued by the Southern Car and Foundry Company for the ninety shares in the Lenoir Car Company, would be turned over to Case, and that the cash paid as dividends on the old stock should be received by Case. It was then agreed that Case should turn over to Colwell, for exchange, the old stock which the former held as collateral, and that in effecting the exchange Colwell should act as the agent of Case. It appears that at this time the old stock was standing on the books of the Lenoir Car Company in the name of Colwell, never having been transferred, but the shares had been assigned and indorsed by Colwell. It was further agreed that the new stock in the Southern Car Company was

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to be issued in Case's name. Case, with the understanding as already stated, turned over the ninety shares of stock in the Lenoir Car Company to Colwell for exchange for the new stock. One hundred and sixty-five shares of preferred stock in the new company were then issued in the name of Colwell, covered by certificate No. 49. This stock, while in the hands of W. P. Chamberlain, president of the new company, was attached in this suit by complainant, McClung *et als.*, as creditors of Colwell. The Southern Car and Foundry Company and the Lenoir Car Company had no notice of Case's claim on the stock at the time of the attachment. So that, upon this statement, the legal question presented is the superiority of the claim of the attachment creditor or the pledgee of the stock.

The Court of Chancery Appeals held that the stock in the Lenoir Car Company had, by the pledge and arrangements of the parties, become the property of Case; that the certificates of stock issued by the new company were paid for by the surrender of stock of the old company, which was the property of Case, and the understanding was that title of these new certificates or shares should at once vest in Case, to be held under the same arrangement and pledge that the stock of the old company had been (held). It was accordingly held that, in contemplation of law, the title to the new stock passed, as between Case and Colwell and the creditors of Colwell, to Case. Second, that if the

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first proposition be not sound the new stock was impressed with a resulting or constructive trust, by operation of law, in the hands of Colwell, and that the rights of Case thereunder were superior to those of attaching creditors.

Complainants appealed, and their first assignment of error is that the Court of Chancery Appeals erred in holding as a conclusion, from the facts stated in their opinion, that J. D. Case turned over the stock of the Lenoir Car Company to the defendant, B. S. Colwell, as agent, for the purpose of having the Southern Car and Foundry Company stock substituted therefor. Second, that said Court erred in holding that the principle of resulting and constructive trusts applies to certificates of stock, and that the stock of the Southern Car and Foundry Company was impressed with such a trust in the hands of the defendant, Colwell. Third, that said Court erred in holding that the rights of said J. D. Case to the stock of the Southern Car and Foundry Company were superior to those of the complainants.

It is argued on behalf of appellant that when complainants attached the said stock of the Southern Car and Foundry Company it was standing on the books in the name of the defendant, Colwell, who was the ostensible owner of it, and clothed with all the *indicia* of title, and that complainants' right to the stock under its attachment cannot be defeated by a secret pledge or agreement between the debtor and another party. Counsel cite in support of this

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position *Young v. South Tredegar Iron Co.*, 1 Pickle, 189; *Cates v. Baxter*, 13 Pickle, 447.

It is conceded in the case at bar that if the new stock had been indorsed to Case, or if its transfer had been made on the books of the company and it had been actually delivered to him, his title would prevail. But there being no indorsement and delivery of the new stock to Case, and no transfer to him on the books of the company, his claim is subordinate to that of complainants.

It is argued that there was simply an unperformed executory agreement between Colwell and Case that the new stock when issued should be turned over to Case. It is insisted that this agreement, as between Colwell and Case, was valid, but not enforceable as between Case and the attaching creditors of Colwell. In a word, it is insisted that as between the parties themselves an executory contract of pledge is good without manual possession, but as to those acquiring intervening rights *in rem*, without notice of the pledge, the pledgee, who has not taken full possession, generally fails to gain precedence. Schouler on Bailments, Sec. 199.

We think the finding of the Court of Chancery Appeals on the facts is a complete answer to the position assumed by counsel for complainant, and that the cases referred to, *Young v. South Tredegar Iron Co.*, 1 Pickle, and *Cates v. Baxter*, 13 Pickle, have no bearing on this case. That Court finds as a fact that the old stock had never been surren-

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dered by Case, but was simply turned over to the pledgor, Colwell, as the agent of Case. Said that Court on this point, viz.: "So while this stock was sent to the debtor, Colwell, it was simply sent to him as agent of Case, to have the necessary change effected, and the stock in the new company, procured in the place of that in the old, to be surrendered." That Court, continuing, said, viz.: "So we are of opinion and hold that when Colwell had the certificates of stock in the new company issued in his name he to this extent violated the trust, but he could not by this act change the legal and equitable rights of Case. The stock in the new company was issued for that in the old. It was paid for by the surrender of the certificates in the old company, and these certificates at the time of the surrender were the property of Case; both the legal title and equitable right and interest in the same at that time rested in Case, and Colwell was merely an agent to whom these certificates of stock had been transferred for this special purpose. It results," said that Court, "that the stock in the new company, although the certificates were issued in the name of Colwell, and although the legal title thereto may be said to have rested in him, it was in equity the property of Case, and was held by Colwell as agent and trustee for Case."

It is denied by counsel for complainants that the pledgor may act as agent for the pledgee, and that to permit a pledgor's agency to be set up against

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attaching creditors, is practically to dispense with delivery altogether, and thus nullify a fundamental rule of bailment. Citing Schouler on Bailment, Sec. 193.

We are unable to concur with counsel in this contention. The authorities are just the contrary. In *Kellogg v. Thompson*, 142 Mass., 76, it was held that if property is delivered by the pledgee to the pledgor to sell or dispose of as his agent, and account to him for the proceeds as agreed upon between them, this transaction would preserve the pledgee's title in the property. In *Thayer v. Dwight*, 104 Mass., 258, it was held that a pledgee does not forfeit his pledge by allowing the pledgor to contract for the sale of the property in his own name. Jones on Pledges, Secs. 42-45; *Harness v. Russell*, 118 U. S., 663. (L. Ed., 285.) In *White v. Platt*, 5 Denio, 269, it was held that where promissory notes are pledged by the debtor to secure a debt the pledgee acquires a special property in them; that property is not lost by their being redelivered to the pledgor to enable him to collect them, the principal debt being still unpaid. Money which he may collect on them is the specific property of the creditors. It is deemed collected by the debtor in a fiduciary capacity. In this State it is said in two cases that the pledgor himself may be constituted the agent of the pledgee. *Johnson v. Smith*, 11 Hum., 400; *Wharton v. Lavender*, 14 Lea, 188; *Grange Warehouse Co. v. Owen*, 2 Pickle, 355.

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Now, as we have already seen, the original stock in the Lenoir Car Company had been legally pledged to Case by an indorsement in blank and an actual delivery of the certificates. The transfer and assignment of a certificate of stock in a corporation either by absolute sale or by way of pledge or security for debt, passes to the vendee or pledgee the title thereto. *Parker v. Bethel Hotel Co.*, 12 Pickle, 274. This stock so transferred to Case was subsequently redelivered to Colwell, as the agent of Case, to exchange for stock in the Southern Car and Foundry Company under an agreement that the new stock should be issued in Case's name. Colwell breached his agreement with Case, and had the new stock issued in the name of Colwell. But this did not affect the title of Case. If, however, this were not so, the new stock would be impressed with a resulting trust that would be superior to the rights of the creditors of Colwell. It has been argued that under our decisions, stock in a corporation is not personal property, and that the doctrine of resulting trust is inapplicable to such property. It is now settled that the doctrine applies to both real and personal property. Bispham's Principles of Equity (1st Ed.), Sec. 80.

In Perry on Trusts, Sec. 130, the author says: "The rule embraces personal property as well as real estate, and if a man purchases a bond, annuity, stock, mortgage, or other personal interest in the name of a third person, the equitable ownership re-

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sults to the person from whom the consideration moves; but it is said that a resulting trust cannot be set up in personal property *perishable* in its nature." Citing *Union Bank v. Baker*, 8 Hum., 447. Pomeroy, in his *Equity Jurisprudence*, Vol. 1, Sec. 1038, says the doctrine (resulting trust) in all its phases applies alike to personal and real property. In a footnote to said section, the following is stated, to wit: "Where a bond or shares of stock or annuity, or any other thing in action, or kind of personal property is assigned to one person a trust therein will result in favor of another who advances the consideration for the transfer in whole or in part." *Continental National Bank v. Weems*, 69 Texas, 489, S. C. 5 Am. St. Rep., 85. See also *Sayles v. Cox*, 95 Tenn., 579; *Arbuckle v. Kirkpatrick*, 98 Tenn., 221.

There is nothing in any of our decisions which would antagonize the general rule. It is true in many of our cases, stock is classified among choses in action (*Young v. South Tredegar Iron Co.*, 1 Pickle, 189), but in *Cornick v. Richards*, shares of stock are treated as personal property. In *Cutes v. Baxter*, 13 Pickle, it is said that in many respects stock is treated as tangible personal property, but still it is after all a peculiar species of property, *sui generis*. By the Code it is provided that stock in corporations is personal property, and subject to levy and sale as such. However it is classified, it is of the

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nature of personal property, and subject to the rules governing resulting trusts in equity.

Finally, it was assigned as error that the Chancellor refused to decree a sale of the stock herein, and after satisfying the claim of Case, apply the balance in payment of the indebtedness due complainant.

It suffices to say in answer to this assignment that even if such relief were allowable, the bill was not framed for such purpose, and there is no pleading which would warrant such a decree. The decree of the Court of Chancery Appeals is affirmed, with costs.

Gaut v. American Legion of Honor.

GAUT v. AMERICAN LEGION OF HONOR.

(*Knoxville*. October 26, 1901.)

1. BENEVOLENT ASSOCIATION. *Insurance, by.*

The certificate issued by a fraternal, mutual, benevolent association to its members, promising, upon a stipulated consideration and prescribed conditions, to pay, at the death of the member in good standing, a definite sum to the beneficiary therein named, is a contract of insurance, in all its essential elements, which must be performed in good faith by the association. This contract measures the right of the member and the obligation of the association, and will be enforced by the courts according to its terms. (*Post*, pp. 617-619.)

2. SAME. *Same.*

A clause in the contract of insurance entered into by a fraternal, mutual, benevolent association by which the insuring member agrees "to conform in all respects to the laws, rules, and usages of the order now in force, or which may hereafter be adopted by the same," does not reserve to the association the power to reduce, by amendment of its by-laws or otherwise, without the insured's consent, the amount payable on his certificate. Such by-law is *ultra vires* and void. The contract, in this respect, is inviolable. The reserved right of legislation, under such contract, is one of preservation and not of destruction of the insurance contract. (*Post*, pp. 619-624.)

Case cited and distinguished: *K. of P. v. La Malta*, 95 Tenn., 157.

FROM KNOX.

Appeal from Chancery Court of Knox County.
 Jos. W. SNEED, Ch.

Gaut v. American Legion of Honor.

CHAS. H. BROWN for Gaut.

WRIGHT & FRANTZ and A. J. CARR for American Legion of Honor.

MCALISTER, J. The question presented for our decision upon the record is in respect of the right of a benefit association to reduce the amount of the insurance certificate issued to one of its members after the contract is executed. The defendant association having undertaken to enforce such a claim of right, complainant filed this bill to annul the by-law adopted by the association reducing the amount of his benefit certificate, and to have his status as a member of such association determined.

The controversy grows out of the following facts as found by the Court of Chancery Appeals: The defendant is a fraternal, mutual, benevolent society, one of whose features is that of insurance to be paid by annual assessment. The society was organized under the laws of Massachusetts in the year 1878, and the purposes as stated in its charter, are as follows:

“1. To unite fraternally all persons of sound bodily health and good moral character, who are socially acceptable, and between eighteen and sixty-five years of age.

“2. To give all moral and material aid in its power to its members and those dependent upon them.

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“3. To educate its members socially, morally, and *intellectually*.

“4. To establish a benefit fund for the relief of sick and disabled members.

“5. To establish a benefit fund from which, on the satisfactory evidence of the death of a member of the order who has complied with all its lawful requirements, a sum not exceeding \$5,000 shall be paid to the family, orphans, and dependents, as the members may direct.”

The order is governed by what is known as the Supreme Council, which is composed of its officers elected bi-enially from its members, the representatives from Grand Councils and Districts and Past Supreme Commanders. The representatives from Grand Councils and Districts are elected by these Grand Councils, and the Grand Councils are composed of representatives of Subordinate Councils elected by the members of the Subordinate Councils.

While the purposes of the order are set out as above shown in its charter, it is evident that the main purpose and object is that of mutual insurance, and it is with that particular feature of the order that this case deals.

It further appears that complainant applied for membership in the order on March 14, 1882, and his application contained a clause, as follows: “I agree to make punctual payment of all dues and assessments for which I may become liable, and to conform in all respects to the laws, rules, and

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usages of the order now in force, or which may hereafter be adopted by the same.”

At that time the law relative to the payment of death benefits appears to have been as follows: “Five thousand dollars shall be the highest amount paid by this order on the death of a member. This sum shall be paid on the death of every sixth degree member, and \$4,000 on the death of every fifth degree member, \$3,000 on the death of every fourth degree member, \$2,000 on the death of every third degree member, \$1,000 on the death of every second degree member, and \$500 on the death of every first degree member; *Provided*, however, that should a death occur when one assessment on each member would not amount to over \$5,000, then the sum paid shall be a proportionate amount of [one] assessment on each member in good standing in the order at the date of the death, according to the degree of the deceased member, and such amount shall be all that can be claimed by any one.”

The application of the complainant was accepted, and he was elected a member of the order and a certificate was issued as follows: “This certificate is issued to companion James W. Gaut, a member of Pioneer Council, No. 34, A. L. H., located at Knoxville, Tenn., upon evidence received from said council that said companion is a sixth degree contributor to the benefit fund of this order, and upon condition that the statements made by said companion in application for membership in said council,

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and the statement certified by said companion to the medical examiner, both of which are filed in the supreme secretary's office, be made a part of this contract, and upon condition that the said companion complies in the future with the laws, rules, and regulations governing the said council and fund, or that may hereafter be enacted by the supreme council to govern said council and fund. These conditions being complied with, the Supreme Council of the American Legion of Honor hereby promises and binds itself to pay out of its benefits to James W. Gaut's estate a sum not exceeding \$5,000, in accordance with and under the provisions of the laws governing said fund, upon satisfactory evidence of the death of said companion and upon the surrender of this certificate; *Provided*, that said companion is in good standing in this order at the time of death, and provided also that this certificate shall not have been surrendered by said companion and another certificate issued in accordance with the laws of this order. In witness whereof the Supreme Council of the American Legion of Honor has hereunto fixed the seal and caused this certificate to be signed by its supreme commander, and attested and recorded by its supreme secretary, at Boston, Mass., this April 15, 1882."

In November, 1894, the complainant, J. W. Gaut, made an application to the Supreme Council American Legion of Honor for a change of the beneficiary, and there was issued by the defendant on

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November 30, 1894, a benefit certificate for five thousand dollars, payable to his wife, Sarah J. Gaut. This certificate reads as follows:

“This is to certify that James W. Gaut having made application for membership to Pioneer Council No. 34, American Legion of Honor, instituted and located at Knoxville, Tennessee, and passed the requisite medical examination, and been duly initiated into said council, *and this certificate is issued to said companion as evidence of the facts in it contained, and is a statement of the contract existing between said companion and the Supreme Council of the American Legion of Honor.* In consideration of the full compliance with all of the by-laws of the Supreme Council of the American Legion of Honor, now existing or hereafter adopted, and the conditions herein contained, the Supreme Council of the American Legion of Honor hereby agrees to pay Sarah J. Gaut, wife, five thousand dollars, upon satisfactory proof of the death, while in good standing upon the books of the supreme council, of the companion herein named and a full receipt and surrender of this certificate, subject, however, to the conditions, restrictions and limitations following:

“1. That all statements made by the companion in the application for membership, and all answers and questions contained in the medical examination are in all respects true and shall be deemed and taken to be express warranties.

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“2. That said companion shall have paid all assessments called within the time and in the manner required by the by-laws of the supreme council in force at the time of the issuance of this certificate, or as the same may be hereafter amended.

“3. That all moneys which the supreme council may advance against this certificate by way of relief benefit to the companion named herein, for sick and disability benefits under existing or hereafter enacted by-laws and regulations, may be deducted at the death of the companion from the amount payable to the beneficiaries herein named.

“4. That in case the companion shall die by his own hands within three years after admission to membership, whether sane or insane, the certificate shall be void, and no liabilities shall exist thereon. And if his death shall be by his own hand after three years, the recovery shall only be had for such fractional part of this certificate as the number of years the companion has been a member of the order bears to the whole number of years he would have been had he lived to be seventy years of age, plus fifty per centum of the unpaid balance. If death shall occur either as the immediate consequent cause of the excessive use of spirituous liquors, the same fractional rule shall apply.

“5. That this benefit certificate is issued by the supreme council and accepted by the companion herein named, for himself and beneficiary, upon the express condition and agreement that in case of any false or

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fraudulent statement or misrepresentation or violation of any of the covenants herein contained, the same shall be void.

“In witness whereof, the Supreme Council of the American Legion of Honor has hereunto affixed its corporate seal and caused this certificate to be signed,” etc. The law of the order relative to death benefits, at that time, was as follows:

“No. 61. Three thousand dollars shall be the highest amount paid by the order on the death of a member. This sum shall be paid on the death of every member holding a certificate for \$3,000, and \$2,000 on the death of every member holding a certificate for that amount, and \$1,000 on the death of every member holding a certificate for that amount. *Provided*, however, that nothing herein contained shall be construed to in any wise impair the obligation of any benefit certificate heretofore issued for a larger or smaller amount than that authorized by the provisions of this law.”

In 1899, said law was amended so as to read as follows: “Two thousand dollars shall be the highest amount paid by the order on the death of a member. This sum shall be paid on the death of every member holding a certificate for \$2,000, and \$1,000 on the death of every member holding a certificate for that amount, and \$500 on the death of every member holding a certificate for that amount; provided, however, that nothing herein contained shall be construed to in any wise impair the obligation of

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any benefit certificate heretofore issued for a larger or smaller amount than that authorized by the provisions of this by-law.”

At a meeting of the supreme council of the order, held in 1899, a by-law similar to the one now attacked, which proposes to affect all certificates, whether issued before or after the passage of the by-law, was passed, but it was left to the executive committee to say whether it should be promulgated, and that committee decided to refer it back to the session of 1900, to determine whether it should be promulgated, and on August 21 and 22, 1900, the supreme council, at its fourteenth regular session, at Atlantic City, N. J., among other business transacted, passed the by-law which is now attacked, and which reads as follows: “Two thousand dollars shall be the highest amount paid by the order on the death of a member upon any benefit certificate heretofore or hereafter issued. This sum shall be paid upon the death of every member holding a benefit certificate of \$2,000 or over, and \$1,000 on the death of every member holding a certificate for that amount, and \$500 on the death of every member holding a benefit certificate for that amount; *Provided*, that if at the death of said member one full assessment upon each of the members of the order will not amount to the full sum of \$2,000, then the amount to be paid to the beneficiaries of said deceased member shall not exceed the amount collected by said assessment

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if said member's benefit certificate is for \$2,000; one-half the amount if the benefit certificate is for \$1,000; one quarter of the amount if the benefit certificate is for \$500, and provided that the face value of the benefit certificate shall be paid so long as the emergency fund of the order has not been exhausted, and provided that said member shall, at the time of death, be a member of the order in good standing, and shall have complied with all the laws, rules, and regulations of the order as they now are, or as they may hereafter, from time to time, be altered or amended."

We do find as a fact that the by-law in question was adopted in good faith by the supreme council, and under the belief that it was for the general interest of the order, and under the belief that if this measure was not taken the dissolution of the order would be the inevitable result. We cannot say positively that their judgment upon this subject was infallibly correct. The matter had been under discussion for some two years, and it was clear that the existing conditions were very damaging to the order, and that it was necessary that something should be done to avoid further withdrawals and to establish a more equitable relation between the members.

As shown by the testimony of the witnesses, the order had been reduced from a membership of some 67,000 to the neighborhood of 12,000, and the certificates of members in class six were rapidly ma-

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turing by death, and drawing from other members amounts largely out of proportion to the amounts contributed by this class to liquidate these claims. So it certainly appeared that something had to be done.

We cannot say that no other steps might have been taken to relieve the situation, nor can we find, as a fact, that if this law had not been passed a dissolution of the corporation would inevitably have resulted. It would seem probable that such would have been the result, and, as we say, it is apparent that the legislative council so believed, and we are not prepared to say that their judgment on this matter was erroneous.

The Chancellor sustained the bill, declaring said by-law No. 55 *ultra vires*, unreasonable, null and void, ordered complainant reinstated in the order as a member in good standing, and in the alternative awarded a reference for damages. The Court of Chancery Appeals, by a majority opinion, reversed the decree of the Chancellor, and dismissed the bill, but held that the complainant had, by his tender, preserved his rights to membership to the extent of his \$2,000 certificate, and taxed the defendant with one-half of the costs.

Complainant appealed, and assigns as error the holding of the Court of Chancery Appeals that the by-law No. 55, reducing the benefit certificate of complainant, was valid. It is stated in the prevailing opinion of the Court of Chancery Appeals that

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the majority are constrained in reaching their conclusion by the opinion of this Court in *Supreme Lodge Knights of Pythias v. La Malta*, 95 Tenn., 157. In that case, the certificate was in a benevolent fraternal insurance order, as in this case. The reservation in the application, certificate, and by-laws was in almost exactly the same language as in this case. When Schuman, the deceased member, became a member of the order, there was no by-law making void benefit certificates where the deceased came to his death by his own hand, whether sane or insane. After he became a member, and before his death, such a by-law was passed, or attempted to be passed. Mr. Justice Caldwell, speaking for the Court in that case, said: "His written application for membership in the endowment rank contains this statement: 'I hereby agree to conform to and obey the laws, rules, and regulations of the order governing this rank now in force or that may hereafter be enacted, or submit to the penalties therein contained.' And the certificate of membership recites upon its face that the consideration upon which it is issued is, among other things, the full compliance by Schuman with all the laws governing this rank now in force or that may hereafter be enacted. These stipulations in the application and certificate were binding upon Schuman while he lived, and they are equally binding upon the plaintiffs since his death."

This Court said in that case: "The fact that its enactment was subsequent to the date of his certifi-

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cate is rendered unimportant by the stipulations in the application, and in the certificate itself, whereby he bound himself irrevocably to full obedience and submission to all legislation then in existence or thereafter enacted for the government of the endowment rank of which he was becoming a member. Those stipulations, however, though in the broadest terms, must be construed as relating to and embracing only such laws as the order had the legal right to make, and as it should make in a legal and binding form. *Supreme Lodge Knights of Pythias v. La Malta*, 95 Tenn., 100.

Judge Wilson, in his dissent from the opinion of the majority, differentiated this case from the *La Malta* case, and expressed the opinion that said by-law No. 55 is inoperative and void. We quote at length from the very able and forcible opinion of Judge Wilson as follows, to wit:

“At the time complainant joined or became a member of the defendant association, he agreed to abide by all its laws in existence, or that might thereafter be enacted. Some year or more ago, the association, or those representing it in its supreme legislative body, enacted a law to the effect that it would not pay, upon the death of any member, a sum in excess of \$2,000 to his beneficiaries. In other words, the association proposed by the legislation, or by-laws, enacted by it to cut down all outstanding policies, or certificates, previously issued by it to members, calling for the payment of over

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\$2,000. It claims the right and power to do this, under the provision of its law in existence at the time complainant joined it, and which was incorporated in the certificate issued to him, whereby and whereunder members agreed to abide by all the laws then in force, or that might thereafter be enacted. Complainant had paid into the benefit fund of the association before this proposed abatement of his policy, or benefit certificate, something over \$4,000. He objected to this legislation, as it is called, and tendered his assessments, as before, upon the basis of his insurance being \$5,000. The association refused to receive the tender, saying that it would receive assessments upon the basis of his policy, or certificate, for \$2,000. His bill was filed to compel the association to recognize him as a member entitled to have his beneficiary paid \$5,000 at his death, provided he still continued to comply with the laws of the order in respect to the payment of assessments, dues, etc., and to have a decree fixing his status in the association.

The case of *Knights of Pythias v. La Malta*, 95 Tenn., is supposed to control this case. That case simply held that, as the member joined the order and became a member of its endowment rank, under the laws governing it at the time he joined, and such others as might be enacted in the future for its government, it was competent for the order, by a properly enacted by-law, to incorporate into all benefit certificates, whether issued before or after the

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passage of the by-law, what is known in insurance law as the suicide clause. That is, a clause forfeiting all rights under the certificate if the holder kills himself, whether sane or insane at the time. It is not my purpose here to controvert the correctness of the holding in the La Malta case. Nor is it my purpose to argue against the proposition, abundantly established by a number of well considered cases, that benevolent beneficial assessment associations that carry in their charters, or articulated purposes, a feature insuring their members upon prescribed conditions, have the right, when it is reserved, to change or modify existing laws for their government, and that such changes or modifications in their existing by-laws may go to the extent of materially altering its methods of conducting its business or increasing the burdens upon its insured members, provided they are reasonable. These changes, or modifications, all range themselves, or ought to range themselves, in the general field of what is best to promote the welfare of the mutual association, and of the best means and methods of enabling it to meet the purpose of its existence and carry out its contracts. That when an association of the character and aim of the defendant issues a certificate to a member promising to pay at his death in good standing in it, a definite sum to his named beneficiary, it enters into a contract, in all its essential elements, of insurance with him, is settled by an overwhelming weight of authorities in

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this country. *State v. Merchants, etc., Exchange Society*, 72 Mo., 146; *Commonwealth v. Wetherbee*, 105 Mass., 149; *State v. Live Stock, etc., Asso.*, 16 Neb., 549; *Minor v. Michigan, etc., Asso.*, 63 Mich., 338; *Presbyterian, etc., Fund, v. Allen*, 106 Ind., 594; *National Mutual Aid Society v. Impold*, 101 Pa. St., 111; *Bankers, etc., Mutual Benefit Assn. v. Stapp*, 77 Tex., 517 (S. C., 19 Am. St. Rep., 772), and full note where above cases are cited. See also *Block v. Mutual etc., Asso.*, 52 Ark., 201 (S. C., 20 Am. St. Rep., 166), and cases cited.

“The doctrine of these cases, and I think the correct doctrine, is that when the courts are invoked in respect to the insurance engagements of these associations, the contract measures the rights of the one and the obligation of the other party, and relief must be granted, if at all, according to its terms. Niblack on Mutual Benefit Societies, Secs. 163, 164, 165; Bacon on Benefit Societies, Sec. 304; *Holland v. Taylot*, 11 Ind., 125; *Union Mutual Asso v. Montgomery*, 70 Mich., 587 (S. C., 14 Am. St. Rep., 519, note, and cases cited).

“The argument is, as I understand it, that while the contract measures the rights of the one and the obligation of the other party to it, the contract is, in fact, what the association sees proper to make it by its subsequent legislation, provided that legislation is enacted in good faith and under an honest belief that the pressure of necessity requires it.

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Expressed in the briefest form, this seems to me to mean, if it means anything practical, that these associations, under the reservation of the right to change their by-laws, can, if they honestly deem it necessary to the perpetuation of their existence, repudiate their insurance contracts with their old members, who have paid premiums or assessments for years, and who, being on the brink of the grave, in the ordinary and general course of nature are too old to get insurance elsewhere. It will not do to say that the defendant, in the new by-law it interposes here, is not proposing the repudiation of its contract of insurance with the complainant. If it can cut down his policy from \$5,000 to \$2,000 by the legislation or by-law passed a year or more ago, it can next year, under the stress of necessity, in what it may honestly deem best to prolong its existence (matters which, from the very nature of its organization, its governing body must, if not finally, primarily, determine) cut it down to \$1,000, and thereafter to \$500, and thereafter in succession to a dollar or a cent. Neither will it do to say, in my opinion that the by-law in question was legitimately adopted, under the right reserved by the association at the time complainant joined it, to pass such legislation or by-laws as it deemed essential to promote the welfare of the order; in other words, as I view the case, neither complainant nor the association, when he joined it, agreeing to abide by the laws then in force or that it might thereafter

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enact, contemplated, expected, anticipated, or believed, that, by virtue of this agreement on his part, it had the right or power to change, impair, or practically repudiate the contract of insurance it made with him. The reserved right of legislation, with respect to its by-laws, agreed to by complainant, meant, in fact and in contemplation of law, or ought to be held by the courts to have meant, in order to preserve any regard for the obligation of the insurance contracts, that it could pass by-laws changing the method of doing its business, levying and collecting premiums or assessments from its insured members, and onerating them with additional reasonable duties or burdens for the preservation of their contracts. To express the idea in a different form, the reserved right of legislation was one of preservation and not one of destruction of its insurance contracts. The La Malta case does not stand in opposition to these views. All that case held, relevant to the question here, is, that subsequent legislation of the Pythian order incorporating the suicide clause into the benefit certificates it had issued, and that it expected thereafter to issue to members of its endowment rank, was valid legislation. The argument is, if legislation of these orders providing that the self-destruction of a member, whether sane or insane, is valid as to members joining the order before the passage of such legislation, it follows that the legislation changing the contract of insurance, radically cutting it down, made with members, is

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also valid. The argument involves not only a *non sequitur*, but assumes the question under debate.

“Legislation avoiding contracts of the character in review, in consequence of acts of the assured, whether he be sane or insane, is jurisdictionally different from legislation that radically impairs, changes, and lessens the money contract obligation of the association, and that, too, without basing it upon any act or conduct of its assured member. One is legislative alteration, impairment, and repudiation of the contract by the will and judgment of the association alone.

“We think these views are sound and impose a proper limitation upon the authority of benefit associations to pass by-laws under the reserved powers of the contract. Other Courts have reached the same conclusion in passing upon similar by-laws.

“In the case of *Knights Templar and Mason's Life Indemnity Co. v. Jarman*, 104 Fed. Rep., 628, it appeared that the application of Jarman for membership in the order contained the following, viz.: ‘I further agree, if accepted, to abide by the constitution, rules, and regulations of the company as they now are, or may be constitutionally changed hereafter.’ The laws of the company were afterwards amended, which reduced the amount of indemnity secured by Jarman's policy. The Court said:

“‘In the second place, we observe that it is not a reasonable interpretation of the clause above quoted from the application that the applicant intended to

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assent in advance to any changes in its constitution and by-laws which the company saw fit to make, even if they reduced the amount of indemnity which the company had promised to pay in the event of his death, and thereby lessen the value of his policy. He was to occupy a dual relation to the company; first, as one of its members; second, as any other individual having a contract with it. In the former relation, he was willing to be bound by any lawful amendment to the company's constitution and by-laws that the members collectively saw fit to adopt, which concerned the government of the corporation or the mode of transacting its business, and did not impair any of the essential provisions of the contract. He probably foresaw that in the course of time the company might find it expedient to make some changes in its methods of corporate government, or in the mode of transacting its business, or in its rules of discipline; and he doubtless intended to assent to all amendments of the constitution and by-laws which were framed for that purpose, and would not deprive him of any substantial right or benefit secured by his policy. It is not reasonable, however, to suppose that he intended to agree in advance that the company might at any time reduce the promised indemnity to any sum which it found it convenient to pay. The liberal indemnity that was promised by the policy as first drawn may have been and probably was the inducing cause which led Jarman to become a member of the defendant company,

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and it would be unreasonable to infer that he intended to agree that after he had paid assessments upon his policy for a period of years, the consideration that had induced him to pay the same might be withdrawn in *whole or in part* without his consent. The record contains no evidence that the deceased member voted for any of the amendments in question or was aware of their adoption during his lifetime. And even if it did appear that he voted for the amendments and was aware of their adoption, the presumption would be that he did so in the belief that the amendments operated prospectively, and not retrospectively, upon antecedent contracts. All contracts, notwithstanding the general words and phrases which they may contain, should receive an interpretation which will accord with the presumed intention of the contracting parties, and will not work an injustice or lead to absurd consequences.

United States v. Kirby, 7 Wall., 482; *Church of Holy Trinity v. United States*, 143 U. S., 457, 461; S. C. Sup. Ct., 511; 361 Ed. 226; *Insurance Co. v. Kearney*, 36 C. C. A., 265; S. C. 94 Fed., 314.

“ ‘Applying that rule of interpretation, we are unable to give to the clause found in Jarman’s application a construction that would enable the defendant company by a simple amendment to its constitution or by-laws to repudiate a stipulation contained in the policy, which, in the estimation of the policy holder, most likely gave to it its chief value. The views we have expressed are in accordance with

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the conclusion heretofore reached by several other Courts, including the trial Court, with respect to the same or kindred questions. *Hale v. Union*, 168 Pa. St., 377 (S. C. 31 Atl., 1066); *Wist v. Grand Lodge*, 22 Or., 271 (S. C. 29 Pac., 610); *Wheeler v. Union*, 92 Hum., 277 (S. C. 36 N. Y. Supp., 734); *Grand Lodge v. Sater*, 44 Mo. App., 445, 453; *Voight v. Kersten*, 164 Ill., 314 (S. C., 45 N. E., 543; *Startling v. Supreme Council*, 108 Mich., 140 (S. C., 66 N. W. P., 340); *Smith v. Supreme Lodge*, 83 Mo. (not yet reported, and cases there cited).’ ’’

We may add in conclusion that the motives which led to the enactment of this by-law are wholly immaterial, nor is the reasonableness of the by-law a factor in the decision of the case. As we view the record, it presents simply a question of power on the part of the association, and being of the opinion that the passage of the law was *ultra vires*, other considerations are immaterial.

- It results that the decree of the Court of Chancery Appeals will be reversed and the decree of the Chancellor affirmed.

Templeton v. Mason.

TEMPLETON v. MASON.

(*Knoxville.* October 26, 1901.)

1. ATTACHMENT. *Plea in abatement.*

The cause for an original attachment averred in a bill, *e. g.*, fraudulent disposition of property by the defendant, cannot be put at issue by answer, but only by plea in abatement. It is otherwise if the bill is framed under § 6097, Shannon's Code, to set aside the fraudulent disposition of the defendant's property and subject it to his debts. (*Post*, pp. 626-632.)

Code construed: § 6097 (S.); § 5031 (M. & V.); § 4288 (T. & S.).

Cases cited: *August v. Seeskind*, 6 Cold., 172; *Foster v. Hall*, 4 Hum., 346; *Brooks v. Gibson*, 7 Lea, 271; *Pace v. Plumlee*, 2 Shann. Cas., 55; *Cheatham v. Pierce*, 89 Tenn., 668; *Tarbox v. Tonder*, 1 Tenn. Ch., 163; *Greene v. Starnes*, 1 Heis., 582; *Renkert v. Elliott*, 11 Lea, 246; *Epperson v. Robertson*, 91 Tenn., 413; *House v. Swanson*, 7 Heis., 34; *Isaacks v. Edwards*, 7 Hum., 468; *Kendricks v. Davis*, 3 Cold., 524; *Boyd v. Martin*, 9 Heis., 386.

2. SAME. *Same.*

The statute authorizing the making, by answer, of any defense that does not go to the jurisdiction does not enable a defendant to put in issue the cause averred in the bill for an original attachment otherwise than by plea in abatement. (*Post*, pp. 629-632.)

Code construed: § 6128 (S.); § 5061 (M. & V.); § 4318 (T. & S.).

3. SAME. *Same.*

Nor does the statute requiring summons to issue in original attachment cases change the rule that the cause for attachment stated in the bill must be put at issue by plea in abatement. (*Post*, pp. 629-632.)

Cases cited: *Bivins v. Mathews*, 7 Bax., 256; *Bank v. Foster*, 90 Tenn., 735; *Robb v. Parker*, 4 Heis., 59.

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4. SAME. *Of right of redemption.*

A debtor's right of redemption in land is subject to attachment. A creditor, even by judgment, is not compelled to pursue the statutory remedy where there has been a fraudulent disposition of the property, and that course would lead to multiplicity of suits. (*Post*, pp. 632-634.)

Cases cited: *Weakley v. Cockrill*, 6 Lea, 272; *Herndon v. Pickard*, 5 Lea, 702; *Ewing v. Cook*, 85 Tenn., 332.

FROM KNOX.

Appeal from Chancery Court of Knox County.
H. G. KYLE, Ch.

TEMPLETON & CARLOCK for Templeton.

LUCKY, SANFORD & FOWLER for Mason.

MCALISTER, J. This is an attachment bill to impound certain property of defendants, and subject it to the satisfaction of complainant's judgment. Complainant prayed that a decree be rendered in his favor against P. S. Mason, Sr., for the judgment set out in the bill; that writs of attachment issue to Knox, Roane, and Cumberland counties, to be levied upon all the legal and equitable rights and interests of the said P. S. Mason, Sr., and especially upon all the equity and right of redemption of the said P. S. Mason, Sr., in the several tracts of land which are described in this bill, and that the same

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be sold in this proceeding in bar of all further equity of redemption of the said P. S. Mason, Sr., for the satisfaction of complainant's demand. The ground alleged in the bill for the issuance of the attachment was that defendant had fraudulently conveyed his property as against the right of complainant, and with the intent to defraud complainant and to defeat him in the collection of said debt, etc. The defendant, Mason, who was a resident of Knox County, was served with process; the attachment issued and was levied. Defendant answered the bill, expressly denying all allegations of fraud made against him in the original bill, and denying that he had fraudulently transferred his property. He also denied that complainant had any right whatever to attach, or subject to the payment of said debts, his equity of redemption in the land described in the bill, but was bound to pursue the statutory method of redemption. On the hearing there was a decree in favor of complainant, the attachment was sustained and the property ordered sold for the satisfaction of the decree. On appeal this decree was affirmed by the Court of Chancery Appeals. Defendant has again appealed and assigned two errors, namely: First, the Court erred in sustaining said writ of attachment and declaring a lien by virtue thereof to exist upon the property levied on, or any part of the same, to secure the judgment rendered against appellant in favor of complainant.

The Court of Chancery Appeals, in sustaining the

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attachment herein, held that it was necessary for defendant to have denied the allegations of the bill upon which the attachment issued, by plea in abatement. There was no plea in abatement, but simply an unsworn answer denying that defendant had fraudulently conveyed his property. It is denied by defendant's counsel that a plea in abatement is necessary in this character of case.

It has uniformly been held in attachment cases that this writ is essential to give the Court jurisdiction of the property, and that in order to reach the writ of attachment, a plea in abatement is necessary. The well recognized exception to the rule is that where an attachment is sued out under § 6097, Shannon's Code, at the instance of creditors, without judgment at law, who are seeking to set aside fraudulent conveyances of property, the defense may be made by answer, and a plea in abatement is not necessary. The reason is that an attachment is not essential to the jurisdiction. It may be issued by the Chancellor at his discretion at the beginning, or during the progress of the cause, to impound and secure the property pending the litigation. Shannon's Code, § 6098; *August v. Seeskind*, 6 Cold., 172; *Brooks v. Gibson*, 7 Lea, 272; *Tarbox v. Tonder*, 1 Tenn. Ch., 163; 11 Lea, 246; 7 Pickle, 413; 7 Heis., 34.

A lien attaches upon the property fraudulently conveyed, upon filing the bill to set aside the conveyance, and is good without an attachment against

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the fraudulent vendor and vendee and creditors. *August v. Seeskind*, 6 Cold., 766; *Brooks v. Gibson*, 7 Lea, 274 (S. C., 1 Lea, 71); 7 Heis., 34; *Greene v. Starnes*, 1 Heis., 582.

A judgment and return of *nulla bona* is not necessary to a prosecution under this section. Shannon's Code, § 6100.

But in cases of general attachment, where the bill does not seek to set aside the conveyance, but simply seeks to subject the property attached to sale, the attachment is essential to jurisdiction, and the grounds of attachment can only be controverted by plea in abatement. *Turbox v. Tonder*, 1 Tenn. Ch., 163; *Pace v. Plumlee*, 2 Shann. Cas., 55; *Foster v. Hall*, 4 Hum., 340; *Isaacks v. Edwards* 7, Hum., 468; *Kendricks v. Davis*, 3 Cold., 524; *Boyd v. Martin*, 9 Heis., 386; *Cheatham v. Pierce*, 89 Tenn., 668.

The argument against this conclusion is that under the statutes any defense, not going to the jurisdiction of the Court, may be made by answer, Shannon's Code, § 6128. The Act of 1871 requires the Clerk or Justice issuing the attachment upon application of the plaintiff to issue also a summons against the defendant, etc. It has been held under this Act that the summons thereunder is the leading process and the writ of attachment is merely ancillary. *Bivins v. Mathews*, 7 Bax., 256; *Bank v. Foster*, 6 Pickle, 735.

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It is then argued that jurisdiction of the person having been acquired by the execution of the subpoena to answer in this cause, that the impounding of the property for the purpose of final relief is not a matter going to the jurisdiction of the Court, and hence the grounds of the attachment may be denied by answer. Counsel cites in support of this position *August v. Seeskind*, 6 Cold., 172; *Nailor v. Young*, 7 Lea, 738.

The case of *August v. Seeskind* was brought to set aside a fraudulent conveyance, and it is conceded that in such a case the defense may be made by answer and a plea in abatement is not necessary. The attachment in such a case is not essential to the jurisdiction of the Court. *Nailor v. Young* belongs to the same class of cases. The Court said, "It is only where the objection is to the jurisdiction of the Court that the Code requires it to be made by demurrer, plea, or motion to dismiss; all other defenses may be incorporated in the answer." "This bill," continued the Court, "is filed under the Code, § 4288 (Shannon, § 6097), which allows a creditor to come into equity for the purpose of setting aside a fraudulent conveyance of property by his debtor without first obtaining a judgment at law. In such a case the jurisdiction of the Court does not depend upon the attachment, which need not be resorted to except to impound the property," citing *August v. Seeskind*, 6 Cold.; *Tarbor v. Tonder*, 1 Tenn. Ch., 163.

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These cases support the rule adopted by the Chancellor, and Court of Chancery Appeals, and there is nothing in recent legislation which has changed this rule.

The fundamental error, as we conceive, underlying the argument of learned counsel, is that jurisdiction of the property is acquired by the service of the summons. *No* lien is fastened upon the property by the filing of the bill, although the summons is executed. The property must be impounded by attachment. It is true, as argued, that by the filing of a vendor's bill, or a bill to foreclose a mortgage when the property is described in the bill, a lien is fastened upon the property upon the filing of the bill, and no attachment is necessary. But this is not so by the simple filing of a general attachment bill, for any of the causes specified in the Code. Although the summons is executed, no jurisdiction of the property is obtained without an attachment. At law, an ancillary attachment is sued out in aid of a suit already brought. Its only office is to hold the property attached under it for the satisfaction of the plaintiff's demand. It does not bring the parties into Court. Caruthers' History of a Lawsuit, p. 88, Sec. 37 (Martin's Ed.)

It was held by this Court that the ancillary attachment not being the leading process, sustaining the plea in abatement did not abate the suit, but only discharges the attachment and restores the property to the defendant. *Robb v. Parker*, 4 Heis.,

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59. This illustrates the office of the summons and that of the attachment—one brings the person, and the other the property, before the Court.

The second assignment of error is that the Chancellor erred in holding that complainant was entitled to a lien by virtue of the attachment upon the equity of redemption in the land sold by him under the proceedings of the Chancery Court at Kingston. Counsel cite in support of this assignment *Weakley v. Cockrill*, 6 Lea, 272, in which it was held, viz.: “The Court is of opinion that the Chancery Court has not the jurisdiction, under the section of the Code cited, to subject to sale the right of redemption in the debtor, as ordered and decreed by the Chancellor. The statutes have prescribed a simple and economical mode of procedure for the redemption of land by the debtor and his creditors. The purchasing creditor may advance his bid and hold the land subject to redemption at his advanced bid, or another creditor may redeem from him, and in turn hold the land subject to redemption by any other judgment creditor, including the purchasing creditor, or by the debtors, upon their complying with the conditions imposed by the statute. And this legislative provision regulating the whole subject excludes other modes of effecting redemption by a creditor who has become the purchaser at the sale.”

The case of *Herndon v. Pickard*, 5 Lea, 702, was a case where a creditor attached the equity of redemption in land of a nonresident debtor. In

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that case the creditor was a general creditor and not a judgment creditor. It was held the bill might be maintained. In the course of the opinion the Court said that the case of *Weakley v. Cockrill* (decided at the same term) only holds that a judgment creditor, who is in condition to redeem, must pursue the remedy given by the statute, but that the complainant in that case was not a judgment creditor, nor can he become such against a nonresident debtor except by attachment of property. That case, however, expressly decides that the equity of redemption in lands is such an estate as may be reached by an attachment in Chancery.

See also *Ewing v. Cook*, 1 Pickle, 332, reaffirming *Weakley v. Cockrill*, 6 Lea. The bills in those causes were filed by judgment creditors to subject the equity of redemption in the debtor's land without asking any other equitable relief and wholly ignoring the plain statutory remedy.

The bill in the present case alleges that the debtor has fraudulently disposed of his property, and prays for an attachment, not only of the debtor's equity of redemption in the Roane County lands, but of various other property in tracts which are described in the bill, seeking to set aside certain alleged fraudulent conveyances and to subject the property to the payment of complainant's judgments. It is argued, however, that the debtor had an opportunity to redeem the land in the manner prescribed by the statute, and that he could have

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pursued his statutory remedy notwithstanding the alleged fraudulent disposition of the property. But it is manifest that the creditor was not required to go through the form of a redemption, and then file his bill to remove a cloud from his title or set aside the fraudulent conveyance. The creditor, with h obstacle in the way of a redemption, had the right to resort directly to a court of equity by attachment of the property.

The Court of Chancery Appeals so held, and we affirm its decree.

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SOUTHERN RAILWAY CO. v. LEINART.

(*Knowville*. October 31, 1891.)

1. DEMURRER TO EVIDENCE. *Waives exceptions to admissibility and competency of evidence.*

By demurring to the evidence the demurrant waives his exceptions taken to the admissibility or competency of evidence, and admits the truth of all the evidence received, though over his objection, whether the same was legally competent and admissible or not. (*Post*, pp. 636-644.)

Case cited: *Bedford v. Ingram*, 5 Hay, 156.

2. SAME. *Evidence sufficient to defeat, when.*

It is sufficient to defeat a demurrer to the evidence in an action for damages caused by defendant's negligence, that the evidence tends to show actionable negligence on the part of the defendant. The evidence, in this case, is reviewed in the opinion and held sufficient to defeat the demurrer. (*Post*, pp. 644-646.)

FROM ANDERSON.

Appeal in error from the Circuit Court of Anderson County. W. R. HICKS, J.

JOUBOLMON, WELCKER & HUDSON and C. J. SAWYER for Southern Railway Company.

X. Z. HICKS for Leinart.

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CALDWELL, J. The Southern Railway prosecutes this appeal in error from a judgment for \$2,500, obtained by next friend of Robert Loving, for personal injuries. At the trial below the defendant interposed objections to the admission of several different items of testimony offered by the plaintiff, for the purpose of showing that Robert Loving was stricken by a moving train of the defendant. The objections were overruled, the testimony admitted, and exceptions noted. When the plaintiff's testimony was concluded the defendant filed a demurrer to the evidence, embodying a literal transcript of all the testimony admitted, with the rulings of the Court, and exceptions thereto, and admitting the truth of all the testimony so set out, and of all proper and legal deductions and inferences therefrom. The Court overruled the demurrer, and on submission for the assessment of damages the jury returned a verdict for \$2,500. Motion for new trial having been overruled and judgment entered, the defendant appealed in error.

The first four assignments of error challenge the correctness of the Court's action in admitting the several items of testimony objected to at the trial below. In respect of these assignments, it suffices to say that the defendant cannot now be heard to make any objection to the admissibility or competency of testimony received below. The demurrer to the evidence, from its very nature, was a conclusive waiver of all exceptions to any testimony that had

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been received. It, in express terms, admitted, as it must have done, the truth of all the testimony introduced, that excepted to as well as that received without objection; and the fact that the demurrant's exceptions were transcribed into the demurrer with the testimony did not narrow the scope of that admission, or render it any the less absolute.

It is the province of the trial Judge, in the first instance, to decide what testimony shall be received and what shall be rejected, and, to reverse his decision, exception must be preserved and brought to this Court by formal bill of exceptions. For the purposes of a demurrer to the evidence, his decision as to admissibility and competency is final. All testimony that he receives must be incorporated in the demurrer and unconditionally admitted to be true, as was done in this case. If only a part be incorporated, or only a part, as that not excepted to, be admitted to be true; or if the admission be limited to the trial Court only, or otherwise qualified, the demurrer will be bad in form, and not subject to compulsory joinder by the other party or to consideration by the Court. The objector may stand by his exception and in due course of procedure bring the point before the revising Court by bill of exceptions, or he may waive his exception and demur to the whole of the testimony received for his adversary. He cannot do both. It would give sanction to vexatious and intolerable experimentation to authorize a party to present all the

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testimony, that excepted to and that not, for the judgment of the trial Court on demurrer, and, on being disappointed in that, then to ask the appellate Court to exclude a part of the testimony which he had previously confessed to be true. A demurrer to the evidence questions only the sufficiency or probative effect of the testimony, and does not question the propriety of its introduction or preserve any objection thereto.

The foregoing views are amply sustained by the authorities—in part by some and in part by others. A few quotations will be made: “Where the objection is to the reception of evidence as admissible, the party ought, if aware of the objection, to object to its reception; if not apprised previously, he ought, after it has been received, to request the Judge to strike it out of his notes, and if the Judge persist in retaining it and stating it to the jury, the proper course is to tender a bill of exceptions; but if the contention is, whether the evidence, being admissible, tends to prove the issue, the proper course is to demur to the evidence.”
1 Starkie on Evi., 530.

“A demurrer to evidence is a proceeding by which the Judges of the Court in which the action is depending are called upon to declare what the law is, upon the facts shown in the evidence, analogous to the demurrer to facts alleged in pleading.
. . . And the question upon a demurrer being whether the evidence offered is sufficient to maintain

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the issue, the party, on such demurrer, cannot take advantage of any objection to the pleadings." 2 Tidd's Prac., 865.

"First, a party disputing the legal effect of any evidence offered, may demur to the evidence. A demurrer to evidence is analagous to a demurrer in pleading, the party from whom it comes declaring that he will not proceed, because the evidence offered on the other side is not sufficient to maintain the issue." Stephen's Plead. (8 Am. Ed.), 90.

"It will easily be perceived that a demurrer upon evidence left open no question whatever in the law of evidence—that is to say, of the admissibility of evidence, but only, like other demurrers, questions of substantive law. As the facts out of which these questions of law arose were supposed to be admitted, so all questions relating to the evidence of those facts 'had become immaterial.'" Thayer on Evi. C. L., 236.

"The proper method of questioning the admissibility of evidence is by objections and exceptions, and if the evidence is allowed to go in, upon a demurrer afterwards interposed, it must be considered as true. Of course, if it is irrelevant, and, therefore, no inference can be drawn from it as to the facts in issue, it will have no effect, even on demurrer. If, however, it does tend to prove the facts in issue, even though it be inadmissible on the ground of incompetence, on a demurrer it will be

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considered, and full effect given to it." McKelvey on Evi., 287.

"A demurrer to the evidence waives objections interposed to the admissibility of evidence by the party who files the demurrer." 2 Elliott's Gen. Prac., Sec. 859.

"Upon a demurrer to evidence no objection to its competency can be taken; this objection is deemed waived." 6 Am. & Eng. Enc. Pl. & Prac., 445.

Such is the language of these several text writers, and none, expressing contrary views, have been found.

The adjudged cases, so far at least as our investigation has extended, are, with a single exception, to the same effect.

Note (*p*) on the page of Stephens cited is this: "But where the question is on the admissibility of evidence, the course is not by demurrer, but by bill of exceptions. Where a Judge admits that for evidence, which is not evidence, there the party must not demur; for if he doth, he admits the evidence to be good, but denieth the effect of it; and therefore, in such cases he must bring his bill of exceptions. And so if the Judge will not admit that for evidence which is evidence. Per. Holt *C. J. Thurston v. Stratford*, 3, Salk. 355." Starkie and McKelvey cite *Bulkely v. Butler*, 2 Barn & Cress. 434, 9 Eng. Com. Law Rep. 133. The

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Supreme Court of the United States cites the same case, after saying: "The Bill of Exceptions was always the more comprehensive remedy, because it extended, as it still does, not only to the facts in the case, but also to the rulings of the Court in admitting or rejecting evidence, and to the instructions given to the jury upon its legal effect. A demurrer to the evidence, while its operation in one respect is nearly the same as that of the bill of exceptions, in another it is very different. It extends only to the evidence produced, as the term imports, and has no effect at all upon the rulings of the Court by which it is received; and as a necessary consequence, where the error of the Court consists in having admitted improper evidence, the effect of a demurrer to it would be to waive the objection to the ruling, instead of laying foundation to correct the error." *Suydam v. Williamson*, 20 How., 435, 436.

The other authorities cite numerous other cases, some of which, and perhaps others, will now be referred to briefly.

In the course of the opinion in *Foster v. McDonald*, 5 Ala., 376, the Court remarked: "We decline the examination of this question (the meaning of a statute) because by demurring to the evidence, the defendant admitted its competency and referred to the Court the question of its legal sufficiency to establish the fact it was offered to prove."

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In *McLean v. Equitable*, etc., 100 Ind., 127, the Court said: "The demurrer waives objections to the admissibility of evidence." The same Court announces the same doctrine in several other cases, among them *Miller v. Porter*, 71 Ind., 521; *Stackwell v. State*, 101 Ind., 1.; *Palmer v. Railroad*, 112 Ind., 250.

Short quotations will show the existence of a like rule in other States. "It seems, however," says the Court of last resort in Kentucky, "that the one party [cannot be permitted to rely on an exception to the admissibility of the evidence and to have a demurrer to the same evidence. By demurring to the evidence, he supplanted his bill of exceptions. The demurrer admits the truth of the evidence, but questions its relevancy and sufficiency. The particular manner in which an admitted truth has been introduced into the case as evidence, does not seem to be of any importance." *Chapize v. Baine*, 1 Bibb, 612.

"It is to be observed that upon demurrer to the evidence, no question can arise as to the admissibility of the evidence. That objection must come up either from a bill of exceptions, or upon a motion for a new trial." *Lewis v. Few*, 5 Johnson (N. Y.), 1.

"One of the defendants demurred to the evidence. The ruling of his Honor, that thereby the defendants admitted the truth of the testimony (received

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over objection), together with such inference favorable to the plaintiff as could reasonably be drawn therefrom, was unquestionably correct." *Hopkins v. Bowers*, 108 N. C., 298, citing 82 N. C., 46, and 107 N. C., 136.

In accord is an early expression of this Court in *Bedford v. Ingram*, 5 Hay., 156. It was there said: "As to Cooper's testimony, will it be of any use to discuss the admissibility thereof? The exception contained in the bill of exceptions is probably overruled by the demurrer to the evidence, which admits the truth of this testimony with all the other testimony set forth in the demurrer, which admission of the truth must be subsequent to the time of its reception. . . . In all legal proceedings, if you make a stand at one point, and afterwards retreat to another, the former is wholly relinquished. It is for the avoidance of going forward and backward and to keep the cause in progression, that the parties must advance continually and not retreat. . . . The bill of exceptions must be abandoned when the demurrer to the evidence is filed. How can you call upon the Court to decide upon the admitted fact, and at the same time say the fact is not admitted; as most certainly it is not if you insist that the evidence it is founded upon is not competent to be received for any purpose. This is certainly so where the demurrer is joined; but where not joined, it is perhaps as if never offered." 5 Hay., 159, 160.

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The Supreme Court of Virginia, without referring to the foregoing authorities or any other authority on the subject, takes a contrary view and, upon argument and reargument, holds that a demurrer to evidence does not waive exceptions to testimony received over objection. *Deshazer v. Maitland*, 12 Leigh, 524.

This is the case previously alluded to as standing alone on the negative side of the question.

The fifth and only other assignment of error is that the trial Judge erroneously overruled the demurrer to the evidence, when he should have sustained it and rendered a judgment for the defendant. The true inquiry under this assignment is that already indicated—namely, is the testimony of sufficient legal force to establish the plaintiff's cause of action; or, differently stated, does it tend to show the defendant guilty of actionable negligence, that is, negligence proximately causing the plaintiff's injuries? There is positive testimony to the effect that the plaintiff, Robert Loving, a young man twenty years of age, left Coal Creek just after nightfall, walking in the direction of his home upon one of the defendant's railway tracks; that soon thereafter one of the defendant's trains passed over the same track at a high rate of speed; that before reaching the station that train stopped at an unusual point and at once moved backward some distance to a small stock gap where the crew and some of the passengers alighted and made an unsuccessful search for a man supposed

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to have been there stricken by the train in passing; that, on further search by other persons some further back, the plaintiff was found, lying on the ground near the track at the end of a small bridge, unconscious, with a severe wound on the side of his head, and other injuries on the same side of his person; that, when restored to consciousness, he remembered only the fact that he had been walking on the track and was unable to give the circumstances of his mishap, but for weeks after the occurrence persisted in the statement that he had been kicked by a mule, when, where or how, he knew not; that there was a notch, about the width of a man's shoe, in one of the cross-ties near the place where the plaintiff was found, and that one of the plaintiff's shoes, that on his injured foot, was bent and wrenched.

There is other testimony of a less positive nature that tends to show that the plaintiff's foot became fastened in the notch mentioned; that while in that situation, unable to extricate himself and in plain and easy view of those on the engine, he was stricken by the pilot, and injured, without an effort on the part of the trainmen to avert a collision; and that, through that misfortune of the plaintiff and that neglect of the railway company, he has been permanently disabled as a laborer and inflicted with impaired sight and memory.

If it were conceded for the sake of argument that the proof of the wrench and bend in the shoe, the

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notch in the cross-tie and the proximity of the plaintiff's body should be entirely passed over as inconsequential, the other facts and circumstances, including or excluding the hitherto unmentioned appearance of something resembling blood on the crossbeam of the pilot, would, nevertheless, justify the inference or deduction that the train, without the observance of any precaution, collided with him while walking on the track; and in that case, as in the other, the defendant's negligence would be the proximate cause of the plaintiff's injury. In the latter instance, the mitigation might have been greater than in the former, but in both the proximate cause would be the same.

It would have been sufficient, and perhaps the better course in disposing of the last assignment of error, simply to have said in general terms that the evidence tends to show actionable negligence on the part of the defendant, for proof tending to establish the issue is all that is required to defeat a demurrer to the evidence.

Let the judgment be affirmed.

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KNOXVILLE v. KNOXVILLE WATER CO.

(*Knoxville*. November 2, 1901.)

1. MUNICIPAL CORPORATIONS. *Notice to members of council of special meetings.*

It is a general rule that every member of a Municipal Council is entitled to reasonable notice of special meetings, and that no important action—*e. g.*, the passage of an ordinance on one of the required readings—can be lawfully done by such meeting unless such notice has been given, or unless the members not notified actually attend and participate in the business of the meeting. But failure to give notice to a member is excused when it was not practicable to do so. (*Post*, pp. 655–666.)

Cases cited: *Land Co. v. Jellico*, 103 Tenn., 321.

2. SAME. *Same.*

The giving of notice of a special meeting to a member of a City Council is excused as not being legally practicable, and the passage of an ordinance at such meeting, on its third and final reading, without his presence, is valid, where it appears that such member was, at the time of the holding and call of such meeting, three hundred miles distant, and outside the limits of the State, and that he had, for a considerable time, been engaged in regular employment outside the State, although he maintained his home in the city, visiting it occasionally, and attending special meetings of the Council when notified. (*Post*, pp. 655–666.)

3. SAME. *Mayor's power to call special meetings defined.*

The necessity and urgency of calling a special meeting of a City Council rests in the sole discretion of the Mayor, and the exercise of his discretion is not reviewable by the courts, where the city charter provides that he may call special meetings, whenever in his judgment the good of the city requires it. (*Post*, p. 665.)

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4. **SAME.** *Publication of city ordinance on Sunday valid.*

Under the requirement of a city charter that its ordinances shall be "printed and published," the publication of an ordinance in a regular Sunday issue of a city paper is valid and sufficient. (*Post*, pp. 666-670.)

Cases cited: *Lucas v. Larkin*, 85 Tenn., 355; *Amis v. Kyle*, 2 Yerg., 31; *Mosely v. Vanhooser*, 6 Lea, 286.

5. **GOVERNMENT.** *Powers of, to regulate public utilities.*

It is settled law that the State, by direct enactment of its Legislature, or by authority delegated by the Legislature to counties or municipalities, may regulate public utilities, and the rates to be charged for public service by corporations or individuals rendering any service to the public. This doctrine has been applied, by the courts, to telephones, elevators, gas companies, water companies, and other public or quasi public utilities. (*Post*, p. 671.)

Cases cited: *Crumbley v. Water Co.*, 99 Tenn., 420; *Watauga Water Co. v. Wolfe*, 99 Tenn., 430.

6. **WATER COMPANY.** *Regulation of rates of charges by city.*

The statute under and by authority of which the Knoxville Water Company was chartered and organized contained this provision, to wit: "And this Act is in no way to interfere with the police or general powers of the corporate authorities of such city, village or town, and such corporate authorities shall have power by ordinance to regulate the price of water to be supplied by such company." The contract between the city of Knoxville and said water company, granting an exclusive privilege for thirty years, contained this stipulation, to wit: "Said company will supply private consumers with water at a rate not to exceed five cents per hundred gallons." Subsequently said water company obtained the city's consent to consolidate with other companies upon its agreement to furnish water at certain "maximum" rates, not exceeding those stipulated in its former contract. Afterward, in 1895, the city, by ordinance, fixed a schedule of charges for water, upon the basis of which said company conducted its business until 1901, when the city fixed, by ordinance enacted pursuant to its power to regulate rates, a new schedule of charges, somewhat lower than those fixed in 1895. The water company denies the city's power to pass this last ordinance.

Held: The city had power to pass the ordinance of 1901, re-

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ducing the charges for water below the rates fixed by the ordinance of 1895, and there being no contest as to the reasonableness of the rates fixed by the ordinance of 1901, the same is valid. The power of regulation conferred upon the city by said Act of 1877 is a continuing one, which is not exhausted by a single exercise of it, but may be exercised, within reasonable bounds, as often as the public interests may demand. (*Post*, pp. 670-692.)

7. SAME. *Same.*

If the power shall be conceded to the Legislature to authorize a municipal corporation to enter into a perpetual and irrevocable contract with a water company for a system of water works and supply of water, whereby such water company shall be and remain exempt from supervision, control, and regulation in the interest of the public, as regards the matter of its rates of charges for water, still, the grant of such authority must be plain, positive, and unequivocal. If there is reasonable doubt it must be resolved against the grant of such authority and in favor of the existence of the power of regulation. (*Post*, pp. 670-692.)

Cases cited: *Harbison v. Iron Co.*, 103 Tenn., 421; *Dayton v. Barton*, 103 Tenn., 604; *Leeper v. State*, 103 Tenn., 503; *Railroad v. Burke*, 6 Cold., 50; *State v. Martin*, 2 Shannon, 555.

8. SAME. *Same.*

Where, under the statute and the contract of the parties, the city has the power to regulate the rate of charges by a water company, the latter cannot justly object that such power of regulation is unreasonable by reason of the fact that the city is one of the water consumers, whose rates are to be regulated, or because the city is interested to depress the value of the company's plant, in order to secure it at an unfair price, under an option which the company had voluntarily given to the city for its purchase. The company has its legal remedies for any wrongful conduct of the city and must pursue them. (*Post*, pp. 688, 689.)

9. SAME.

It is not a valid objection to a statute giving a city the power to regulate the rate of charges of a water company, that it contains no express provision, on its face, that such regulation shall be reasonable, and that the statute makes no provision for contesting or ascertaining the reasonableness of rates fixed by the city. The company's right to have judicial investiga-

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tion of rates fixed exists, and can be enforced independently of any statutory authorization. (*Post*, pp. 670-692.)

FROM KNOX.

Appeal in error from Circuit Court of Knox County. JOSEPH W. SNEED, J.

PICKLE & TURNER and J. W. CALDWELL, for Knoxville.

C. T. CATES, JR., for Water Company.

WILKES, J. This suit arises out of an effort upon the part of the city of Knoxville to enforce an ordinance which affects the defendant water company, and, as it claims, seriously interferes with its operations, and unlawfully encroaches upon its franchises and vested rights. The water company has a valuable plant at Knoxville, which it has erected and operated under contracts and ordinances made by the city of Knoxville, and it has valuable franchises in the furnishing of water to the city and people. The relative rights of the city and water company, and their obligations, one to the other, appear to have been drawn into sharp controversy, when the city, on March 30, 1901, passed and approved the ordinance, in controversy in this suit, specifying a maximum rate to be charged to con-

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sumers by any firm or corporation in the city of Knoxville, and providing a high penalty for a violation of its terms and provisions as set forth in its third section, to wit:

“SECTION 3. *Be it further ordained*, That it shall be unlawful for any person, company, firm, or corporation, or their officers, agents, servants or employees, supplying water to the inhabitants of the city of Knoxville, to charge, demand, or collect for water so supplied more than the rates hereinbefore set forth in Section ‘1’ of this ordinance; and it shall also be unlawful for any such person, company, firm, or corporation, or their officers, agents, servants, or employees to cut off or otherwise interfere with the supply, or refuse to furnish a supply of water to any consumer for failure to pay for same; *Provided*, such consumer tenders, in lawful money, the charge for such water at the rates aforesaid, and any violation of the provisions of this section of this ordinance shall be a misdemeanor, and upon a conviction thereof before the Recorder, the offender shall be punished by a fine of not less than \$10, nor more than \$50, for each offense.”

The defendant company continued to charge the rates provided in a contract and previous ordinance of October 30, 1899, which (with the exception of some rates in the Lonsdale-Beaumont ordinance) were slightly in excess of the rates and charges provided in said ordinance of March 30, 1901, and thereupon this suit was instituted, and the defendant

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was charged with unlawfully charging, demanding, and collecting of W. K. McClure, for water furnished and to be furnished him in the city of Knoxville, more than the rates fixed therefor by the ordinance of March 30, 1901.

McClure was the agent for J. S. Gratz, who then lived in the city of Chicago, but was the owner of three houses and lots in the city of Knoxville, and outside of the Tenth Ward. In 1896 the defendant company made a contract with Gratz to supply water to the premises owned by him, which contract is as follows:

“KNOXVILLE WATER COMPANY,

“Service No. 2850.

“Knoxville, Tennessee, Sept. 17, 1896.

“The undersigned hereby applies to the Knoxville Water Company for a supply of water at premises No. 706 High street, owned by J. S. Gratz, occupied by tenants, to be used for domestic purposes only, and I hereby agree to use and pay for the same in accordance with the rates, rules and regulations of the Knoxville Water Company as now, or hereafter in force, and which are made a part of this contract. And I further agree that said company may enter upon any land owned by me, and in which I may have such right and place therein, upon the terms provided therefor, all the pipes that may be used for furnishing such supply, and may cause the same to be inspected and repaired at any future time as occasion may require.”

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This contract was signed by J. S. Gratz by his agent, W. K. McClure.

The water in controversy was furnished to tenants living in the property owned by Gratz for whom McClure was agent, and who, as such agent, represented the owner Gratz in renting the property, and the bills were rendered to W. K. McClure as agent, and paid by him in that capacity, but actually paid out of funds belonging to the owner, J. S. Gratz: and the bills so rendered for said water were in accordance with the rates prescribed by said contract and ordinance of October 20, 1899; the difference between the rates charged by defendant and paid by Gratz, through McClure, for the three premises to which the water in controversy was furnished, and what would have been paid under the ordinance of March 30th, 1901, was \$1.15, that is 50 cents, 42 cents and 23 cents respectively.

The first question presented is as to the validity of the ordinance of March 30, 1901, because of the manner of its passage by the City Council. The charter of the city of Knoxville provides that no ordinance shall become a law without first having been read and passed at three several meetings—that is, at three several regular meetings of the board, or at three several regular meetings, or valid “call,” or “special” meetings, which the Mayor, by said charter, is authorized to call. The regular meetings of the Board of Mayor and Aldermen of the city of Knoxville are on the first and third

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Friday nights of each month. The ordinance of March 30, 1901, was passed on its first reading at a special meeting on March 9, 1901; on its second reading, at a regular meeting on March 15, 1901; and on its third and final reading, at a special meeting on March 30, 1901. The Mayor and eleven Aldermen—that is, one Alderman for each ward, constitute the Board of Mayor and Aldermen of the city of Knoxville. At the special meeting of March 30, 1901, Alderman Cleage, representing the Sixth Ward, and Alderman Trigg, representing the Fifth Ward, were not present and were not notified, and no effort was made to notify them, nor did they have any notice or knowledge of said meeting. Alderman Trigg had removed from the city, and notice to him, it is conceded, was not necessary. Alderman Cleage was not present at the meeting of March 30, 1901, was not notified of that meeting, and had no knowledge thereof. When Alderman Cleage was elected an Alderman for the Sixth Ward of the city of Knoxville, he was then, as he was in March, 1901, residing with his mother, on Broad street, in the Sixth Ward of the city of Knoxville, but he was in the employ of the Southern Railway, with headquarters principally at Asheville. He was active in the discharge of his duties as an Alderman, attended nearly all of the regular meetings, and such special meetings as he had notice of, and was usually informed by telegram of special meetings, and had attended as many as three special

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meetings in one week, coming more than a hundred miles to do so. No effort was made to notify Alderman Cleage of either of these special meetings.

On request for a finding of facts, the trial Judge found that it was practicable to have given Alderman Cleage notice of these special meetings, and that it was practicable for him to have attended the meeting of March 9, 1901, and that no emergency existed for the passage of the ordinance in question at these special meetings.

The first assignment of error we consider is that the trial Judge erred in holding that the Mayor was bound to give Alderman Cleage notice of the special meetings of March 9 and March 30, 1901, these being the dates when the ordinance in question was passed on its first and third readings, and for failure to give such notice the ordinance is void. The contention is that said Cleage was out of the city and State and not within summoning distance, and no personal notice to him of said meetings was practicable, and, therefore, the action of the Council without notice to him was not thereby invalidated. In support of this assignment authorities are cited. The fact that Alderman Cleage was not notified of the meeting, and that no attempt was made to notify him, fully appears, and is not controverted.

The general rule is that every member of a municipal council is entitled to reasonable notice of special meetings, and that no important action can

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be lawfully done by such meeting unless such notice has been given, or unless the members not notified actually attend and participate in the business of the meeting. *Land Co. v. Jellico*, 19 Pickle, 321.

It is said that the rule is quite rigidly stated in that case, but that, conceding it to lay down the general doctrine, still there are exceptions to such general rule and that one of these exceptions excuses notice when it is not practicable to give it, and for this proposition is cited in the printed brief. 1 Dillon on Mun. Corp., Sec. 286; 1 Beach on Pub. Corp., Sec. 271; 15 Enc. L. (1st Ed.), pp. 1034, 1035.

Other authorities are cited as applicable to cases of private corporations and inferior municipal and school boards which we think we need not consider. As bearing upon the main question, it is suggested that it has never been the custom in Knoxville to give notice to each and every one of the board of special meetings; that Cleage had virtually removed himself from the State, so that service upon him was impracticable; that in the case of *Land Co. v. Jellico*, 19 Pickle, 320, it appeared that the alderman who was not notified was in the building where the meeting was held, and the inference might be that he was purposely omitted from the notice as he was hostile to the ordinance that was considered, and the meeting was at the instance of the persons interested in the passage of the ordinance, while in this instance, as afterwards developed, Alderman Cleage

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was in favor of the ordinance, and would have voted for it if he had been present at the meeting.

We pass over these and minor exceptions and proceed to consider the merits of the first assignment.

In 1 Dillon on Municipal Corporations (4th Ed.), Sec. 286, it is said: "If the meeting of the council be a special one, the general rule is, unless modified by the charter or statute, that notice is necessary and must be personally served if practicable upon every member entitled to be present so that each one may be afforded an opportunity to participate and vote."

In Section 263 it is said: "A notice when necessary, must, if practicable, be given to every member who has a right to vote when the act is one to be done by a body consisting of a definite class or classes, and it must be given by or issued by some one who has the authority to convene a corporate meeting.

"But notice may be altogether dispensed with or its necessity waived by the presence and consent of every one of those entitled to it. It must be served personally upon every resident member, or left at his house. If temporarily absent it may be left with his family, or at his house or last place of abode. An order to serve all is not sufficient. All, if practicable, must be served, but if the party entitled to notice has entirely quit the municipality and

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has no family or home within its limits, notice is not necessary.”

In Section 264, it is said, among other things: “Such great importance is attached to notice, that it can only be waived by universal consent, but if every member of a select body be present at a regular or stated meeting, or at a special meeting, they may, *if everyone consents, but not otherwise*, transact any business, ordinary or extraordinary, though no notice was given, or an insufficient notice, but the *unanimity of consent should clearly appear from their recorded declarations, acts or conduct*. . . . If the charter imperatively requires a special notice it cannot be waived even by the consent of all.”

In 1 Beach on Public Corporations, Sec. 263, it is said: “When a meeting is assembled for a special purpose every member who has a right to vote is entitled to notice unless he has quit the municipality without retaining a home or leaving his family within its limits. . . . It must be personally served upon him, but in case of his temporary absence it may be left with his family or at his last place of abode.” Again, Sec. 271: “Every member entitled to be present at a special meeting is entitled to notice of the time and place thereof, which must be served upon him personally if practicable, or unless some other mode of notice is prescribed by the statute or charter.” For all these propositions, authorities are liberally cited.

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In 15 Am. & Eng. Encl. L., 1035, it is said:
. “A meeting held at any other time than that fixed for a regular meeting under a resolution of the council, or a special meeting under the call of the Mayor is a legal meeting if all its members actually attend and participate in its proceedings, and it is otherwise regular.”

In *Lord v. Anoka*, 36 Minn., 176, it was held that under the charter of the defendant a special meeting of the city council is not valid unless called by the Mayor by written notice to each member of the council, delivered to him personally or left at his usual place of abode; or unless all the members, at least all who are not notified, are present at the meeting.” And in *Beaver Creek v. Hastings*, 52 Mich., 528, it is said notice may be dispensed with or waived by the presence of everyone entitled to it.

In *Paola Railroad v. Commissioners*, 16 Kan., 302, holding that the acts of a board of county commissioners at a special meeting were invalid because all members were not notified, Mr. Justice Brewer said: “The statute providing for the sessions of the county board is found in Sec. 13, p. 256 of the general statutes. That section, after providing for the meeting of the board in regular session, adds: ‘And any special session on the call of the chairman, at the request of two members of the board, and as often as the interest of the county may demand.’ This is the only statutory provision

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on the subject. It does not specify whether the call shall be verbal or in writing, how long prior to the meeting it shall be made, or require a record to be preserved of it. And the same is true as to the request. But still it requires a call, and the call of the meeting, in the legal sense of the term, is a summons to the parties to meet, directing them to meet. It involves something more than a mere purpose in the mind of the caller or an expression of that purpose unheard, unseen and unknown. It implies a communication of that person to the parties to be affected by it. How it shall be communicated is sometimes prescribed by the statute or by-law. It is sometimes provided that it shall be by publication in a newspaper; sometimes by printed notice served personally or at the residence, and sometimes by mere oral personal service. But in some way or other notice must be given; and if there be no regulation as to the manner of notice, it must be personal notice. This is no new question. It has arisen in respect to the sessions of common councils of cities, boards of directors or trustees of private corporations; the town meetings of New England, the meetings of most of corporations, boards of directors, etc., and there is but one uniform rule running through the authorities. In the case of *Rex v. Mayor, etc., of Shrewsbury*, Rep. Temp. Hard., 151, it was said by the Court that "when the acts are to be done by a selected board, notice must be given of the time of special

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meetings.” It was a saying of Lord Kenyon’s that special notice must be given to every member who “has a right to vote.”

In regard to County Boards, it is said: A special session of the board has no power to transact business unless it has been called in the manner provided by law, and notice of the meeting is in all cases essential. 7 Am. & Eng. Enc. L. (2d ed.), 979, note 2, citing among other cases, *Pike Co. v. Rowland*, 94 Pa. St., 238, which holds that if the meeting be special, notice is necessary, and it must be personally served, if practicable, upon every member entitled to be present.

In *People v. Batchelder*, 22 N. Y., 129, it was held that the election of the Clerk of the First District Court was void, because five absent Aldermen had no notice of the convention. Mr. Justice Selden, for the Court, said: “It is not only a plain dictate of reason, but a general rule of law, that no power or function entrusted to a body, consisting of a number of persons, can be legally exercised without notice to all the members composing such body.”

The case of the *State v. William Kirk*, 46 Conn., 397, is somewhat obscurely reported, but, as we read it, it appears that William Kirk was elected Street Commissioner of the city of Bridgeport, on April 8, 1878. It appears that he had been previously elected to the same office, but the exact date does not appear. He insisted that he was legally elected on April 8, but if that contention

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was not correct, he was rightfully in office as a holdover from his former election. It appears that at the first election one member of the board was not notified. The Court held that a good reason was shown why actual notice was not given. The member absent was not only gone from the State, but his whereabouts appears not to have been known until afterwards. Notice in writing was left at the store of his son, where he was in the habit of visiting every day when he was in town. The Court said no other notice could well have been given, and the law never required impossibilities. But in the same case it appeared that by the charter the Mayor was, *ex-officio*, a member of the board, and its chairman, and entitled to preside. He was not notified of the meeting, and it was held that the meeting was illegal, although he had no vote except in case of a tie. And it appeared that in the particular instance he would have had no vote. The report of the case, as furnished us, is not satisfactory, but it clearly appears that the Mayor might have been notified and was not, and the meeting was adjudged illegal; while, in the other case, the member could not be found, and hence was not notified, though all was done that could have been done, and it was impossible to do more.

The finding of the trial Judge, which was asked for by the plaintiff, as to Alderman Cleage, contains, among other statements not important in this

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connection, the following: "At the time of his election as an Alderman of the city of Knoxville, and on March 9, 1901, and March 30, 1901, he was in the employ of the Southern Railway Company, as law agent, with his headquarters at Asheville, in the State of North Carolina, and transacted his business principally in the States of North Carolina and South Carolina, and outside the limit of the State, his territory including about five hundred miles of railroad. His duties require him to go in person over his territory, investigating, reporting, and adjusting claims for damages against said railroad company; that during the months of February, March, and April, he was more than usually busy in the discharge of his duties, but retained his home in the Sixth Ward of the city of Knoxville, and was active in the discharge of his duties as an Alderman; that he attended nearly all the regular meetings of the Council, and nearly all the special meetings of which he had notice; that it was impracticable for him to have been present on March 30, 1901, at the special meeting on that date, but it was not impracticable to have given him notice of that meeting; that it was not impracticable to have given him notice of the meeting of March 9, 1901, but it does not appear that it was impracticable for him to have attended that meeting; that there was no emergency for this ordinance to be considered at special meetings of March 9 and March 30, 1901, and as a public servant and official he had a right

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to have notice of these meetings, but notice was not given him, and, therefore, this ordinance of March 30 is invalid.”

There are various exceptions to the finding of the trial Judge, but we think we need notice only one or two of them.

In the tenth subdivision of the third assignment of errors, it is said: “He (the trial Judge) erroneously found that it was practicable to have given Cleage notice of the special meetings of March 9, and March 30, 1901, and that it does not appear to have been impracticable for him to have attended the meeting of March 9. There was no evidence to support this finding. It was contrary to all the evidence on the subject. Cleage was beyond the limit of the city and State, his exact whereabouts were unknown to the officials of the city, and the facts and circumstances, as shown by Cleage as well as his direct testimony to the fact, all show to the contrary of the Court’s “finding on this question.” This assignment, that there is no evidence to support the finding of the trial Judge, requires us to go behind that finding and look into the record and see whether there is any evidence on which to base it. In this connection it may be remarked that the question whether notice was or was not practicable, is one of mixed fact and law. It appears from the testimony in the record, that each call for a special meeting on March 9, and March 30, 1901, was for a meet-

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ing to be held on the night of the same day the call was made, that is, on the night of March 9, and March 30, respectively. It clearly appears from the evidence of Alderman Cleage that on both of these days he was beyond the limits of the State. He cannot identify particularly the exact places where he was on the ninth, but he was at some point on his territory, all of which was outside the limits of the State. He is very positive and definite that on March 30, 1901, he was in North Carolina at the extreme end of his territory, about three hundred miles from Knoxville.

We are of opinion that when a member of the Council removes from the State or is continuously absent from the State, and when he is shown to have been absent from the State and beyond reach on the occasion and at the time of the call, as appears in this case, it is not *legally practicable* to give him notice of call meetings. As to the necessity and urgency of such called meetings, the Mayor must be the judge. In this case it appears that action was desired at the time in order to put the new ordinance in force before the beginning of another quarter, when current bills for water would be payable in advance. As to the sufficiency of this urgency, it is not incumbent on us to determine. The charter provision is that the Mayor may call special meetings whenever, in his judgment, the good of the city requires it.

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Tested by these rules which make the question as to whether or not notice was practicable, one of mixed law and fact, we think the evidence is that notice of these special or call meetings was not legally practicable to have been given to Alderman Cleage. Moreover, it appears that if he had been notified of the call of March 30, as soon as possible after it was made, it would not have been practicable for him to have attended the meeting of that day as he was about three hundred miles from the City of Knoxville. This, however, we consider of no practical importance.

The ordinance not being invalid because of the manner of its passage, we proceed to consider the other question presented in the record.

It is further objected to this ordinance that it is invalid and inadmissible in evidence because it was published in a Sunday newspaper. It appears that the ordinance, by authority of the city, was published in the Sunday issue of the *Journal and Tribune*, a morning daily paper of the City of Knoxville, on March 31, 1901. It further appears that since 1866 Sunday editions of the daily paper have been published in this city and that these editions are the largest and most important, have the largest circulation, and are the best advertising mediums of any of the daily issues of the paper.

By the charter of the City of Knoxville, Acts, 1885, special session, Ch. 3, Sec. 28, it is pro-

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vided: "This Act is declared to be a public Act, and may be read in evidence in all courts of law and equity, and all ordinances, resolutions, and proceedings of the Board of Mayor and Aldermen may be proved by the seal of the corporation, attested by the Recorder, and when printed and published by the authority of this corporation, the same shall be received in evidence in all courts and places, without further proof, when certified to by the Recorder."

This is the only requirement as to the publication of ordinances.

We have been cited to quite a diversity and collection of authorities, bearing more or less upon this feature of the case. It has been held in Tennessee that the acknowledgement of a deed by a married woman, with her privy examination, is valid, though made on Sunday. *Lucas v. Larkin*, 1 Pickle, 355.

It is said contracts in Tennessee made on Sunday have never been held by our Supreme Court to be void. It is held by the Federal Courts, construing Tennessee statutes that they are valid. *Swann v. Swann*, 23 Fed. Rep., 299, citing *Amis v. Kyle*, 2 Yer., 31; also notes to Shannon's Code, § 3029.

As applied to newspaper publications, which may be regarded as process, they are held void, just as any other judicial proceedings on Sunday are invalid, under the rule, both at common law and by statute

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above stated, that Sunday is *dies non juridicus*. 17 Enc. Plead. & Prac., 102. The leading case cited in support of this text is *Schwed v. Hartwitz*, 22 Col., 187 (S. C., 58 Am. St. Rep., 221.) This holds that the publication of a notice of a tax sale is in the nature of service of process, and if it takes place in a Sunday edition of a newspaper, it is void. The same holding upon the same ground is made in the case of *Saunyer v. Cargille*, 72 Ga., 290, which is another tax sale case. See note to 24 Enc. Law, 577. But no other notice or publication made on Sunday, unless specially prohibited by statute, is void.

“In *Hastings v. Columbus*, 42 Ohio St. Rep., 585, it is held that the publication of a preliminary and other ordinances of street improvement, which were required to be made in a newspaper of general circulation, may be made in a paper published only on Sunday.” This case is directly in point.

“Where there is a stipulation between private parties that notice shall be given by publication of ten days, publications on Sunday may be counted.” *Kingsbury v. Buckner*, 71 Ill., 514. Cited in note 1 to 24 Encl. L., 1 Ed., 577.

“In South Carolina it is held that notice of escheat is not a process, such as is meant that Sunday is *dies non*, nor when published in a newspaper on that day, is it served on that day. The statute forbidding the service of civil process on Sunday does not make such process void.” *Eason v. Wil-*

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Jcoskey, 29 S. C., 239. Cites in note 24 Encl. L., 1 Ed., 575.

“Notice to a consignee, given on Sunday, of the arrival of a cargo is valid.” *Lake v. Hurd*, 38 Conn., 540.

“And notice to quit is not invalid because given on Sunday.” *Sangster v. Noy*, 16 L. T. (N. S.), 157; 24 Encl. L., 1 Ed., 579.

“So, too, an enlistment made on Sunday is valid.” *Walton v. Garvin*, 16 Q. B., 48.

The statute laws of the different States are so variant, that we can derive but little aid from their holdings. It is further said the validity or the invalidity of an act done on Sunday does not rest upon religious or moral grounds, or upon public policy, but solely upon the question as to whether it violates the provisions of the law, either statutory or common. *Swann v. Swann*, 21 Fed. Rep., 299. *Mosely v. Vanhooser*, 6 Lea, 286.

It is the purpose of the publication of an ordinance like that in question to bring it to the attention of the public, and it appears that the publication in a Sunday newspaper is the most effective notice that could be given in the City of Knoxville. If it accomplished the very purpose intended by the requirement, to publish the act, and there is neither public policy or forbidding statute to be contravened by the act of publication, it seems that no grounds could be suggested why this publication is not good. We think this is the correct view, notwithstanding

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the very able and ingenious argument made by counsel and backed up by many authorities of high respectability, among which may be cited: *Ormsly v. City of Louisville*, 75 Key, 197 (S. C., 4 Am. & Eng. Corp. Cases, 842); *Duman v. City of Denver*, 65 Prac. Rep., 580; *Sewall v. City of St. Paul*, 20 Minn., 511; *Scammen v. City of Chicago*, 40 Ill., 146; *Schwed v. Hartwicz*, 23 Colo., 187. Many of these cases could be distinguished, but, after all, there is a conflict of authority arising largely from a difference in the Sunday laws of the several States.

We are content with the conclusion we have reached as being the most practical and at the same time free from any valid legal objection.

In order to properly appreciate the very serious questions presented on the merits, it is necessary to give a short resume of facts bearing upon the history of the Water Works Company and its connection with and relation to the City of Knoxville. A condensed statement of these facts, as given by counsel and which we find substantially correct, is as follows:

By the charter of the City of Knoxville, as compiled from former Acts, and as embodied in the Acts of 1885, Special Session, Chapter 8, Section 18, Subsection 7, the Board of Mayor and Aldermen is authorized by ordinance "to provide the city with water by water works, within or beyond the boundaries of the city, or provide for supplying the city with water otherwise."

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The Knoxville Water Company was chartered and organized under Act of 1877, Chapter 104, amendatory of the Act of 1875, Chapter 142. Section 2 of that Act provides that "such charter shall not be granted until after leave to operate under the same shall have been first had and obtained from the corporate authorities of the city, town or village in which it is proposed to operate such water works, and such leave shall be certified by the Mayor or Recorder upon the application, and registered with it. And *this Act is in no way to interfere with the police or general powers of the corporate authorities of such city, village or town, and such corporate authorities shall have power by ordinance to regulate the price of water to be supplied by such company.*" It is insisted, and as we think correctly, that it has been settled that the State, by direct enactment of its Legislature, or by authority delegated by the Legislature to counties or municipalities, may regulate public utilities, and the rates to be charged for public service by corporations or individuals, rendering any service to the public. This doctrine has been applied to elevators, telephones, gas companies, water companies and other public or *quasi* public servants.

The leading case on this subject is that of *Munn v. Warehouses*, 94 U. S., 183. See, also, *Turnpike Co. v. Croxton*, (Ken.) 23 L. R. A., 177, and extensive note thereto, reviewing the various cases on the subject; R. R. Commission cases, 116 U. S., 307,

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347, 352; *San Diego Water Co. v. San Diego* (Cal.), 62 Am. St. Reports, 261, and extensive note thereto, reviewing many cases on the subject, p. 289; *Danville v. Danville Water Co.* (Ill.), 69 Am. St. Reports, 304; *Rogers Park Water Co. v. Fergus* (Ill.), 69 Am. St. Reports, 315; *Crumbley v. Water Co.*, 15 Pick., 420; *Spring Valley Water Co. v. Schottler*, 110 U. S., 347 (S. C., 28 L. Ed., 173); *Watauga Water Co. v. Wolfe*, 15 Pick., 430; *Rushville v. Rushville Natural Gas Co.*, 15 L. R. A. and note.

That such power may be delegated to a municipality, see *San Diego Water Co. v. San Diego*, *supra*; 15 Am. & Eng. Enc. L. (1 Ed.), p. 1167.

On July 1, 1882, an agreement was entered into between the City and the Water Company in regard to the erection by the latter of water works, and the supplying for a period of thirty years, the City and its inhabitants with water, in which, among other things, it is stipulated by Section 7 "said company will supply private consumers with water at a rate not to exceed five cents per hundred gallons."

This contract provides as follows:

"2. The City further obligates itself not to grant to any other person or corporation, any contract or privilege to furnish water to the City of Knoxville, or the privilege of erecting upon the public streets, lanes or alleys, or other public grounds for the purpose of furnishing said City or the inhabitants thereof with water for the full period of thirty

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years from the first day of August, A. D. 1883.”

A further statement of facts is as follows :

On April 18, 1891, an ordinance was enacted by North Knoxville, constituting an agreement between it and Wheeler & Parks, for the latter to supply said town and its inhabitants with water until June 3, 1913, and by Section 9 of that ordinance it was provided that water to be furnished private consumers shall be charged for at “not exceeding the rates contained in the following schedule,” and then sets out said schedule of rates. That contract was subsequently assigned to the Knoxville Water Company by Wheeler & Parks, and the town of North Knoxville became consolidated with and incorporated into, the City of Knoxville.

On September 17, 1892, an ordinance was enacted by the City of West Knoxville, constituting an agreement between it and the Lonsdale-Beaumont Water Company for the supply of water to said town and its inhabitants by said company for a period of twenty years in which it was provided among other things, by Section 9, that said company shall not charge consumers during the continuance of the franchise granted by said ordinance “exceeding the following maximum annual rates,” etc., and then sets out the schedule of such rates. Said contract was subsequently assigned by said Lonsdale-Beaumont Water Company to the Knoxville Water Company, and the town of West Knoxville became consolidated with, and incorporated into, the City of Knoxville.

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On October 20, 1899, an ordinance was passed by the City of Knoxville, then embracing the territory of North and West Knoxville, authorizing said Knoxville Water Company to take the assignment of said contract of the Lonsdale-Beaumont Water Company, to supply water to the inhabitants of the territory of West Knoxville, upon certain conditions, among which was, that they should furnish to the inhabitants of such territory water at a maximum "rate not exceeding that fixed in the ordinance and contract of September 17, 1892," and further, that they should supply to the inhabitants of the balance of the City of Knoxville, water "at a maximum rate, not exceeding that fixed by the contract of July 1, 1882, and the schedule of rates and charges now in force and operation by the Knoxville Water Company."

On May 17, 1895, the City passed an ordinance regulating the supply of water by meter, and fixed the rates and charges therefor to private consumers, and these rates were incorporated into the schedule of rates of the defendant in force on October 20, 1899. On July 27, 1900, the City passed another ordinance regulating and fixing the rates generally to be charged to consumers of water at a lower rate than that fixed by the schedule in force on October 20, 1899, and repealed all former ordinances in conflict therewith. Again, on March 30, 1901, the City re-enacted this ordinance of July 27, 1900, with slight amendments, fixing the same schedule of water

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rates as those set out in the ordinance of July 27, 1900.

The present suit arises under the last ordinance. The question of whether the rates fixed by the ordinance in question are reasonable has been pretermitted in the proof and not considered in this case.

It is insisted that it has been held that, when the power to regulate rates for public service of a public corporation is delegated to a city, the city becomes invested with such power as a public trust, and cannot divest itself thereof by contract. *Huron Water Co. v. Huron* (8 Dak.), 30 L. R. A., 848; *Ogden City v. Ogden Water Co.* (Utah), 41 L. R. A., 305. Again, the State (and of course a city) cannot contract away its police power, or limit its exercise by contract, and this is conceded. *Bourman v. R. R. Co.*, 125 U. S., 465; *Stone v. Miss.*, 101 U. S., 814; *Butcher's Co. v. City Co.*, 111 U. S., 746; *Gas Co. v. Light Co.*, 115 U. S., 50; *Mugler v. Kansas*, 123 U. S., 624; *New York v. Mila*, 11 Peters, 139. But it is denied that such a case is presented in the one at bar.

The matter of controversy in this case will first be treated from the standpoint of a contract, outside of the operation of the police powers of the municipality. Treating the regulation of rates, as a matter of contract, it has been held that a "charter specification of rates which it shall be lawful for a turnpike company to charge, subject to certain increase

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or decrease, if necessary to keep the company's dividends within certain limits, does not constitute an irrevocable contract between the State and the corporation, but is merely an indication that such rates are supposed to be reasonable, without precluding the subsequent exercise of legislative power to change the rates." *Turnpike Co. v. Croxton* (Ky.), L. R. A., 177. See notes to this case for a general discussion.

In the case of *Danville v. Danville Water Co.* (Ill.), 69 Am. St. Rep., 304, the Court held:

"The Legislature has the power to regulate the rates at which water shall be supplied to the public by a water company, especially where such right is reserved by the statute under which said company was incorporated.

"Municipal corporations can exercise only such powers as are conferred upon them by their charters. All persons dealing with them must see that they have power to perform the proposed act.

"The statute empowering a city to authorize a private corporation to construct water works, and to contract for a supply of water for a period not to exceed thirty years, gave no power to the city to bind itself by fixing a rate at which it must pay for such supply for such entire period, and an ordinance fixing the rate for the entire thirty years is void.

"Although a city has been empowered by statute to authorize a private corporation to construct water works, and to contract for a supply of water, not

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to exceed thirty years, a subsequent statute empowering any city in which a private corporation has been, or may be authorized to supply water for public use, to fix reasonable water rates, is constitutional, and an ordinance passed under the later statute reducing existing water rates, and fixing them at a reasonable price, is valid, although the city enacting it has, under the earlier statute, attempted by ordinance to fix water rates at a certain figure for the entire unexpired period of thirty years." *Danville v. Danville Water Co.*, 69 Am. St. Rep., 304. "To the same effect see the decision in the case of *Rogers Park Water Co. v. Fergus*, 178 Ill., 571, cited in note to the foregoing case at p. 315. It is there held that an ordinance fixing the rates for the full period is merely a declaration that such rates are reasonable at the time when the ordinance was enacted, and that the City is not bound to recognize such rates as reasonable for the full period, and has power to fix the water rates so as to make them reasonable at any time, or from time to time, as changed conditions may effect the reasonableness of the water rates formerly established, and that mandamus will lie at the suit of a citizen to compel the water company to furnish him with water at the changed rates, provided they are reasonable."

In the case of *San Diego Water Co. v. San Diego*, from California, 62 Am. St. Rep., 261, the power to regulate water rates is recognized and

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enforced with the like qualification that they must be reasonable.

“The case of *Rogers Park Water Co. v. Fergus*, cited above, and of *Danville v. Danville Water Co.*, and also the additional case of *Freeport Water Co. v. Freeport*, all from the Supreme Court of Illinois, were taken by writ of error to the Supreme Court of the United States, and on March 25, 1901, were affirmed.” 21 Supreme Court Reporter, 490, 493, 505. “In these cases the Supreme Court of the United States held that municipal corporations may be invested by statute with the power to bind themselves by an irrevocable contract and to regulate rates, but such power must be conferred in explicit terms, and that a contract concerning governmental functions, as one which affects the right of a city to regulate rates of a water company, must be strictly construed, and such functions cannot be held to have been contracted away by doubtful or ambiguous provisions, and further, that an ordinance granting an exclusive franchise to the water company, with the right to use the streets, requiring the municipality to pay certain rentals, and binding the company, among other things, to furnish an adequate supply of water, does not give a contract right to charge the rates named in the ordinance for the whole period of the franchise, by virtue of the provision that the grantee “shall charge the following annual rates to consumers during the existence of this franchise,” as this is merely a

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regulation of the right to charge rates, and does not amount to a stipulation that no other regulation will be made during the term of the franchise.”

It will be seen from an inspection of these cases that the Supreme Court was divided in opinion, the minority relying upon the cases hereafter cited by the defendant as controlling. This difference, as we understand it, extends not only to the question of the power of the State to authorize an irrevocable contract, but likewise whether the regulation of rates is within the police power.

In a very able and exhaustive argument, counsel for the Water Company insists that the ordinance of March 30, 1901, impairs the obligations of prior contracts made by the city with the defendant company, and is therefore void, and in support of this contention are cited: Constitution United States, Sec. 10, Art. 1; Constitution State of Tenn., Sec. 20, Art. 1; *New Orleans Water Works Co. v. Rivers*, 115 U. S., 674; *New Orleans Gas Light Co. v. Louisiana*, 115 U. S., 650; *St. Tammany Water Works Co. v. New Orleans Water Works Co.*, 120 U. S., 64; *Walla Walla v. Walla Walla Water Co.*, 172 U. S., 1; *Los Angeles Water Co. v. Los Angeles*, 177 U. S., 570; *Santa Anna Water Co. v. Town of, etc.*, 56 Fed. Rep., 671; *Bank of Ill. v. Akron City, etc.*, 76 Fed. Rep., 671; *Old Colony Trust Co. v. City of Atlanta*, 83 Fed. Rep., 42; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. Rep., 720; *City of Cincinnati v. Cameron*, 38 Ohio, 380; *Cable Co. v.*

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Baltimore, 66 Fed. Rep., 140; *Los Angeles Water Co. v. City of Los Angeles*, 103 Fed. Rep., 711; *Crosby v. City Council of Montgomery*, 108 Ala., 498; *State, ex rel., v. Laclede Gas Light Co.*, 102 Mo., 472.

We do not deem it necessary to comment upon all these authorities, but will notice some of those most relied upon and most nearly in point.

The case of *Los Angeles Water Co. v. Los Angeles*, 177 U. S., 570, is much relied on.

Attention is called to the fact that Justice McKenna, who delivered the opinion in the Los Angeles case above cited, delivered the opinions in the Illinois cases, *supra*, and he rested it upon the ground that express authority had been granted to Los Angeles to enter into a contract limiting its power to regulate water rates. It is said on p. 470 of the opinion, that "it is not denied that the city had the power to regulate rates."

"The contract of July 22, 1868, with the Water Company provided that the Mayor and Common Council of said City shall have, and do reserve, the right to regulate the water rates charged by said party of the second part, or their assignees, provided that they shall not so reduce water rates or so fix the price thereof, as to be less than those charged by the party of the second part for water." Pp. 560, 570. On April 2, 1870, the Legislature for California passed an act, held in that case to be valid, ratifying and confirming said contract. Pp. 561,

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571. It is, therefore, held that since the city had entered into this contract by such legislative authority, and that the contract did not grant the power to regulate rates, which power was already existent, but was a contract to limit that right, the city had no power by ordinance to violate it.

“It will be further observed that this case arose under acts and contracts made before the adoption of the Constitution of California, of 1879, providing for the regulation of water rates. P. 567.

“In the case of *Old Colony Trust Co. v. City of Atlanta*, 83 Fed. Rep., 39, it is held that the City could not regulate street car fares, because no such power had ever been delegated to the City. The City asserted such power under the provisions of its own charter, and also those of the charters of the street car companies, but the Court, upon construing those charters, held that they granted no such power.

“The charter of the street car company granted certain franchises and privileges to the company, ‘provided that the rates and fares on said railroad shall be subject to the approval of the Mayor and City Council of the City of Atlanta.’ In the city ordinance granting to this company the use of the streets, etc., it was provided that the charges for passage on said road shall not exceed twenty cents for any through line, and ten cents for half lines or short distances.

“The Court declines to express an opinion as to whether this constituted a contract between the city

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and the company, but said that if the proviso in the railroad company's charter granted any power to regulate, it was exhausted upon its first exercise. But the Court does not determine what effect would be given to a direct grant of power to the city to regulate fares, instead of this mere reservation out of the franchises granted to the railroad company, and further held that the power to approve, such as was reserved in this charter, is not equivalent to the power to regulate and fix rates. See p. 24.

“The case of *Santa Anna Water Co. v. Town of Buena Ventura*, 56 Fed. Rep., 339, simply holds that the Constitution of California of 1879, requiring annual regulation of water rates, would not avoid a valid contract previously entered into by a city, with a water company, authorizing a water company to fix its own rates. The case has no application to the questions involved in the present case.”

The case of *Walla Walla v. Walla Walla Water Co.*, 172 U. S., 1, is a case somewhat peculiar in its facts. By an act of the Territory of Washington, incorporating the City of Walla Walla, it was enacted that it should have power to provide a supply of water and to grant the use of the streets for a term not exceeding twenty-five years, provided none of the rights and privileges herein granted shall be exclusive nor prevent the council from granting the same rights to others.

The City, in pursuance of this Act, passed an or-

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dinance in 1887, granting the Company the right to lay, place, and maintain all necessary water mains, pipes, connections and fittings in all the highways, streets and alleys of the city for the purpose of furnishing water. In 1893, it passed another ordinance to provide a system of water works of its own, and one of the questions presented was its power to pass the latter ordinance. The Court said: "The case upon its merits depends largely upon the power of the City under its charter. The ordinance authorizing the contract, which purports to have been passed in pursuance of the charter, declared that until such contract be avoided by a court of competent jurisdiction, the City would not erect, maintain or become interested in any water works except the ones established by the Company, while the ordinance of June 20, 1893, provided for the immediate construction of a system of water works by the City, for the purpose of supplying the City and its inhabitants with water. Upon the face of the two ordinances there was a plain conflict; the latter clearly impaired the obligation of the former. The City contended that the original ordinance was beyond its power to make; first, because it created a monopoly not authorized expressly or impliedly by legislative grant, and was void as being in contravention of public policy; second, that it was an attempt to contract away a part of the governmental powers of the City Council, and for other reasons which we need not notice.

The Court held that as the original contract was

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limited to twenty-five years, and was not an exclusive grant, that it was not beyond the power of the City Council; that if it had been exclusive it would have been a monopoly and objectionable, unless authorized by express sanction of the Legislature. The Court further held that the contract would be void if it interfered with the police power of the City, and this police power extended to the peace, good order, health and morals of the inhabitants, and if deleterious to them it might be controlled by the City, or the contract entirely abrogated under the police authority of the City; but the Court held that the matter of the contract did not fall within the police power, but the contractual power of the City.

In the case of the *State, ex. rel. City of St. Louis v. The Laclede Gas Light Co.*, 102 Mo., 472, 483, the charter of the company granted by the State authorized the company to fix the price of gas manufactured by it, and it was held that such price could not be diminished by subsequent legislative action, State or municipal. It was further held that the regulation of the price of gas by the State or by municipalities created by it is not the exercise of a police power, which cannot be abrogated by contract. . . . It may be said that under the grant from the Legislature in the Missouri case, it was intended to remove the company from the exercise of the police power of the State over it, in so far as its rates of charge were concerned.

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While not assenting to the views expressed in that case, we think this case clearly distinguishable from the present one under consideration, in that the Legislature in the Missouri case intended to put the question of rates beyond future control of the State or municipality and beyond its police regulation, while in the present case, under Sec. 2 of the charter, it was clearly intended to keep the question of rates under control and to treat them as subject to police supervision.

Under the cases we have cited and others that might be collated, it is, we think, apparent that the authorities are not agreed as to whether the State can by legislative grant empower a municipality to enter into an irrevocable and perpetual contract with a water company or other private or quasi public corporation for a system of water works and a supply of water, and whether such company can by legislative grant be removed from the supervision of the police power of the municipality, yet we think there is no question but that in order to do so the legislative grant must be unquestionable and admit of no other construction, but must be plain, positive and unequivocal. If the municipality has no such power under legislative grant, it can make no such contract, nor can it waive its police powers or refuse to exercise them when the good of the citizens of the municipality demands.

What matters fall within the scope of the police powers of the State or of a municipality has never

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been definitely determined. A large number of subjects have been embraced, such as the public health, the public morals, the public safety, and the general and comprehensive clause of the public welfare, and after the enumeration of all the subjects under these and other general heads, the text books announce that there are also other instances. Different jurisdictions lay down different rules and limits. In *Theilan v. Porter*, 14 Lea, 626, "the safety and tranquility of the community and the orderly existence of the government is included in the enumeration." As to what may be done under this power, see generally Dillon on Municipal Corporations, p. 95, Sec. 71, N. 141, 142, 244, 314, 752, note p. 920; 8 Ency. L., 1 Ed., 620, 624; 18 Ency. L., 1 Ed., 752. *Harbison v. Iron Co.*, 19 Pick., 423; *Leeper v. The State*, 19 Pick., 503; *L. & N. R. R. Co. v. Burke*, 6 Col., 50; *State v. Martin*, 2 Shannon, 555; *Dayton v. Barton*, 19 Pick., 604.

It was said in *Stone v. Mississippi*, 101 U. S., 814: "No Legislature can bargain away the public health or the public morals."

While the rate to be paid for water is not so palpably a regulation within the police supervision of a city, as is the purity and supply of the water furnished, yet the rate of charge is a matter which affects the health, welfare and comfort of the city, since if rates are unreasonably high they will prove a restriction upon the use of water, which

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may seriously impair the health and interfere with the comfort and welfare of the people, especially the poorer classes, who, by reason of high prices may be cut off from the benefit of the water, partially or altogether.

The case of *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. Rep., 720 (S. C., 177 U. S., 558), is relied on to show that a city may waive or renounce its right to regulate water rates, but, as we have before stated, it appears that express authority was given to that City in its charter to enter into a contract limiting its power to regulate rates, the language of the charter being in substance that the City may regulate the rates "*provided they shall not so reduce such water rates or so fix the price thereof as to be less than those now charged by the parties of the second part (the water company) for water.*"

But the difference in that case and the present is, that by the charter of Los Angeles, the city had the express power to make an irrevocable contract, while in this case, the city of Knoxville is not by its charter granted such a right, but the proper construction of the charter is, we think, that the City shall have a continuing right to regulate the charges for water, limited only by a condition that such rates shall not be unreasonable and oppressive. As before stated, this question of reasonableness or unreasonableness of rates is not considered in the present case, but seems to have been waived by consent.

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It is said that it is unreasonable to give to the City of Knoxville the right to regulate the water rates of the Company when it is itself the principal party to be affected by such rates, and in this connection the language of Mr. Justice Jackson in *Cleveland Gas Light & Coke Co. against the City of Cleveland*, 71 Fed. Rep., 614, is cited as follows:

“It would be a fearful proposition, monstrously absurd and outrageous, if the Legislature which undertook to confer upon a citizen of Cleveland, the right to say at what price services should be rendered to him, or what he should pay for goods and articles furnished him. There is hardly any law in this land that would make the party being furnished the judge of the price that he should pay, or would say that his arbitrary decision should fix the rights of the parties. The city of Cleveland has undertaken to do that thing. . . . The thing cannot be done, and ought not to be done.” 71 Fed. Rep., 614. But the fallacy, as we think, in this argument lies in the fact that the question of the reasonableness or unreasonableness of the rates is always open to judicial investigation, and while it may safely be said that the Legislature cannot constitutionally delegate the power to fix prices at which water shall be sold in a city by the authorities of the city, which is itself a consumer, either in its municipal capacity or through its inhabitants, without liability to a judicial investigation of the reasonableness of the rates fixed by such authorities. Still, if

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no such provision is made in an ordinance, the law will imply one and preserve to the Company its right to litigate the question upon that ground. We do not think it necessary that the provision be incorporated in the contract or in the ordinance, but it will be implied when not expressly provided for.

It is said in addition that the City has an option to purchase the plant after 1898, and the argument is made that the city authorities by oppressive legislation and ordinances may make the plant unproductive and less valuable in order to secure it at less than it is worth, but in answer to this we think we can safely say the defendants may protect themselves against such action and results by a recourse to the courts, and protection against ordinances which are intended to, or do, have such results. No such case is before us now, as the question of the income and profits of the Water Company has not been opened nor considered, and the naked question here being the power to regulate the rates as the City in its judgment may deem right and just.

Recurring again to the provision in the second section of the charter, Act of 1877, Ch. 104, we think that its proper construction is, that nothing in it and no power granted by it to the corporation to contract for and provide water shall in any way interfere with the police or general powers of the city, and it expressly provides that such corporate authorities shall have power by ordinance to regulate the price of water to be supplied by such company.

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It is to be noted that defendant's counsel insist that the proper construction of Section 2 of the charter of the city is that, while the city originally had the power to regulate the price of water to be supplied by the Company, it is not a continuing right, but that, having once exercised it, its power was exhausted, and having once made a contract for a certain schedule of rates it is bound by such contract. The contention is forcibly put as follows:

The City was the "master of the situation:" If it chose to refrain from making a contract, it might exercise the power of regulation, limited only by what would be unreasonable and oppressive. But if it should exercise the power vested in it, and specially conferred upon defendant company, and enter into a contract with said company for the use of water, and agree upon price for the use of such water, then it became bound by that provision of the Constitution of the United States, which is written into every contract that it is sacred from alteration, change or impairment except with the consent of the other party. And it is said: If such were not the case, what City could persuade parties to invest their capital in improvements, which, to be profitable, must either be permanent or continue for such a length of time as to enable the investor to receive some return upon the amount invested by him? A different construction would be disastrous to the interest of the City.

In *Freeport Water Co. v. Freeport*, 21 Supreme

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Court Reporter, 498, it is said: "This power of regulation is a power of government continuing of its nature, and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt it must be resolved in favor of the existence of the power."

In the words of Chief Justice Marshall, in *Providence Bank v. Billings*, 4 Peters, 514, 561, L. Ed., 939, 955, its abandonment ought not be presumed in a case in which the deliberate purpose of the State to abandon it, does not appear. In that case the term used was "*at such rates as may be fixed by ordinance.*" It was said, the words "*fixed by ordinance*" may be construed to mean by ordinance once for all to endure during the whole period of thirty years, or by ordinance from time to time, as might be deemed necessary. Of the two constructions that must be adopted, which is the most favorable to the public? not that one which would so tie the hands of the Council that the rates could not be adjusted as justice to both parties might require at a particular time.

The language of the City charter in the present case is not that the corporate authorities shall have power by ordinance *to fix, but to regulate* the price of water to be supplied by such company, and in the same connection the full police and general powers of the corporation are reserved to it.

We are of opinion that the right to regulate rates

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was not exhausted by an agreement at any particular time upon a schedule of prices, but it is a continuing right under the terms of the charter, but not to be exercised arbitrarily and unreasonably, and when rates are so reduced as to become oppressive upon the company, and so as not to yield a fair income on the investment, the Court can interfere upon a proper showing and restrain such action. As has been very tersely said: a reasonable rate the law assures, even against governmental regulation. 21 Sup. Court Rep., 497, *Rogers Park Co. v. Fergus*; 21 Sup. Court Rep., 498, *Freeport Water Co. v. Freeport*.

The rates adopted by the ordinance are not shown by the proof to be unreasonable, and the ordinance is not shown to be oppressive, and its violation subjects the defendant to the penalties imposed.

The judgment of the Court below is reversed, and judgment will be entered in this Court as herein indicated.

Foster & Webb v. Scott County.

FOSTER & WEBB v. SCOTT COUNTY.

(*Knoxville*. November 2, 1901.)

1. ACCOUNT. *From another county.*

In an action upon an account, coming from another State or another county of this State, properly proved in compliance with the statute, its correctness is not in issue unless it is denied under oath.

Code construed: § 5561 (S.); § 4259 (M. & V.); § 3780a (T. & S.).

2. SAME. *Same.*

The affidavit to an account coming from another State, or another county of this State, which puts the defendant to denial of same upon his oath, in order to put its correctness at issue, must be made by the plaintiff himself, and not by an agent. (*Post*, p. 695.)

Code construed: § 5561 (S.); § 4259 (M. & V.); § 3780a (T. & S.).

Cases cited: *Cave v. Baskett*, 3 Hum., 342; *Hunter v. Anderson*, 1 Heis., 3; *Brown v. Stabler*, 1 Heis., 444; *Briggs v. Montgomery*, 3 Heis., 675; *Brien v. Peterman*, 3 Head, 499.

FROM SCOTT.

Appeal from Chancery Court of Scott County.
H. G. KYLE, Judge.

A. G. EWING and J. F. BAKER, for Foster & Webb.

H. CLAY JAMES & S. E. YOUNG for Scott County.

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WILKES, J. This bill is filed to collect an open account in favor of complainants, against Scott County, for books and stationery supplies. With the bill is exhibited an account sworn to in Davidson County, where the complainants reside and do business. This account is sworn to before a Notary Public of that county by J. O. Edwards, who makes the oath as to the correctness of the account as bookkeeper of the firm of Foster & Webb.

The bill itself is sworn to by an attorney for complainant in Scott County. The oath to the answer is waived. An unsworn answer is filed, but there is no denial under oath of the justice and correctness of this account. In this condition of the record, and without any evidence the case was heard on a regular call of the docket, when judgment was rendered for the amount of the account against the county, and it was appealed.

The Court of Chancery Appeals reversed the decree of the Chancellor, and held the complainants not entitled to recover, and they have appealed to this Court and assign errors.

The Court of Chancery Appeals held that the account was substantially and sufficiently proven under the statute, Shannon, § 5561; that the affidavit there provided for need not be made by the firm or any member of it who was complainant, but that it might be made by the bookkeeper of the firm as the party who would be most likely to know of its correctness.

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That Court also held that while the correctness of the account should have been denied under oath, either in the answer or otherwise, still if no such denial was made, under oath, and no exception was taken on that account by the complainant, the liability on the account and its correctness would be considered as put at issue and if no proof was introduced by the complainant, he must fail in his suit for want of proof.

We are of opinion the Court of Chancery Appeals is in error. The statute referred to, is in these words: "An account on which action is brought coming from another State or another county of this State with the affidavit of the *plaintiff* to its correctness, and the certificate of a State Commissioner annexed thereto, or the certificate of a Notary Public with his official seal, annexed thereto, or the certificate of a Justice of the Peace with the certificate of the Clerk of the County Court that such justice is an acting justice in his County, is conclusive against the party sought to be charged, unless he shall, on oath, deny the account."

The reason and policy of this Act are said to furnish an easy and ready means of collecting accounts when no real defense exists, unless it shall be denied on oath and the plaintiff thereby notified to make proof. *Cave v. Baskett*, 3 Hum., 342; *Hunter v. Anderson*, 1 Heis., 3; *Brown v. Stabler*, 1 Heis., 444; *Briggs v. Montgomery*, 3 Heis., 675.

The Court of Chancery Appeals says: "Of course

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the correctness of such knowledge is naturally within the special knowledge of the bookkeeper. If this were a controlling feature we could not assent to it. It is more reasonable to assume that the bookkeeper makes no sales, and is not personally cognizant of the sales made by the partners or their salesmen, and knows only that he is directed by them to make such entries and charges as they report to him. The presumption is rather that he knows nothing personally of the transaction, and his only information of it is such as comes to him upon the statements of other persons. He could only testify, perhaps, to the correctness of his entries as reported by salesmen to him, and not as to the correctness of the items sold. But this, we think, is not material. The statute is plain that the correctness of the account must be sworn to by the plaintiff. It does not say nor imply that the oath may be made by a bookkeeper, or salesman, or agent of any kind.

We would not hold that when the suit is by a firm in which several partners are named as composing the firm, and are joined as plaintiffs in the suit, that the oath must be made by each and every one of them, but it must be made by some one of them who is a plaintiff to the suit and has the requisite information. Such is the rule in case of joint defendants, *Brien v. Peterman et als.*, 3 Head, 499.

If the plaintiff cannot, for want of proper information, make the oath himself, then he does not bring himself within the provisions of the Act, and is not

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entitled to its benefits, but must prove his account as in other cases. We cannot extend or enlarge the terms of the statute to let in the sworn *ex parte* statement of a third person, no matter what may be his means or the extent of his information, nor how much such a holding may be desirable. The plaintiff can have the benefit of the sworn statement of third persons, only when the case is tried and such third persons are called to testify as witnesses.

The result reached by the Court of Chancery Appeals is correct but on these grounds. The decree of that Court is affirmed, and the complainant's suit is dismissed at their cost, but without prejudice.

Hamby v. Lane.

HAMBY v. LANE.

(Knoxville. November 2, 1901.)

1. HOMESTEAD. *How set up in pleadings.*

In a suit against husband and wife, by the husband's creditors, to set aside a conveyance of realty made by him to his wife as voluntary or fraudulent, and subject the property to his debts, it is not essential that the wife set up and claim in her pleadings her right of homestead, *eo nomine*, in such realty, but it is sufficient, if it appear from all the facts averred in the pleadings that she is entitled to homestead in the property. The pleadings in this case, though informal, sufficiently state her right to homestead. (*Post*, pp. 699-701.)

Cases cited: *Smith v. Carter Bros.*, 16 Lea, 527; *Gray v. Baird*, 4 Lea, 215.

2. SAME. *Wife's right not defeated by husband's fraudulent conveyance to her.*

The wife's right of homestead is not defeated by the husband's fraudulent conveyance to her of the property to which that right has attached, even though she participated in the fraud. (*Post*, pp. 701-703.)

Constitution construed: Art. 11, Sec. 2.

Code construed: § 3798 (S.); § 2935 (M. & V.); §§ 2110a, 2114a (T. & S.).

Cases cited: *Ruohs v. Hooke*, 3 Lea, 302; *Powell v. Warren*, 2 Shannon, 144; *Howell v. Thompson*, 95 Tenn., 396; *Gray v. Baird*, 4 Lea, 215; *Cox v. Ballentine*, 1 Bax., 363; *Cronon v. Honor*, 10 Heis., 533; *Mynatt v. Magill*, 3 Lea, 72.

FROM MORGAN.

Appeal from Chancery Court of Morgan County.
H. G. KYLE, Judge.

Hamby v. Lane.

WRIGHT, WRIGHT & MORRIS, for Hamby.

JOHN M. DAVIS, for Lane.

WILKES, J. The original bill in this cause was filed to set aside a conveyance made by George W. Lane to his wife, L. E. Lane, upon the ground that it was voluntary and fraudulent in law and fact. The Chancellor held that the conveyance was voluntary, and directed the land to be sold, free from the right of redemption and free from the homestead exemption. The defendants prayed an appeal which was refused, and the land was sold and bought in by the complainant for \$120. The report of sale was confirmed and title was divested out of Lane and wife and vested in complainant, and the defendant Lane and wife appealed, and assigned as error that the sale was improperly made free from the homestead exemption. The Court of Chancery Appeals modified the decree of the Chancellor, set aside the sale and remanded the cause to the Chancery Court of Morgan County to the end that a resale might be had subject to the homestead exemption, upon a credit of six and twelve months and free from any right of redemption. The Court of Chancery Appeals found that the conveyance of Lane to his wife was voluntary and fraudulent in law, inasmuch as Lane was indebted to insolvency when the conveyance was made. That Court considers the questions whether the conveyance was not also fraudulent in fact, and, while their finding upon this

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feature is somewhat equivocal, it is in substance and effect that the conveyance was not only voluntary but made for the purpose of defrauding the creditors of the husband, and this fraud was known to the wife and participated in by her, at least to the extent that she attempted to fraudulently withhold the lands from the creditors of the husband after the filing of this bill. The costs of the cause, up to the entry of the decree of sale, were adjudged against the defendants, and subsequent to that decree to the complainants, including the costs of the appeal. Complainants have prayed a broad appeal to this Court and assigned quite a number of errors. It is not necessary to take these up *seriatim*, and we will proceed to consider the real grounds of objection.

It is said it was error to hold that defendants had a homestead in the land; that if, as a matter of law, they had a homestead, it was error to so adjudge in the absence of any plea setting it up in express terms, and in holding that the statements of the answer were sufficient to set up such homestead without a formal plea for that purpose, and finally that costs should not have been adjudged against complainant. It is averred in complainant's bill that defendant Lane, at the time of the conveyance and when the bill was filed, owned no other real estate than that in controversy; and the Court of Chancery Appeals find this to be the fact, as well as that Lane was the head of a family. These

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facts entitle him to a homestead. It is next said that he did not claim the homestead by proper plea. In the answer of Lane and wife to the bill they denied the right of complainant to sell the land. Among other things it was said: "The defendant Lane admits that he is a poor man. He has no property subject to execution. He also admits that he has no real estate, but he is advised that this is no offense and affords no good and lawful reason why the home of his wife, the co-defendant, should be sold to satisfy a debt that she did not in anywise contract."

It is not necessary that the homestead exemption should be set up by plea or special claim, when facts are stated which clearly show that it exists, as in this case. *Smith and Wife v. Carter Bros. & Co.*, 16 Lea, 527; *Gray and Wife v. Baird*, 4 Lea, 215. But if it were necessary to make the claim, the allegations in this answer are sufficient for that purpose. The next question presented is whether the husband and wife have lost, waived or forfeited their homestead as the result of the conveyance by the husband to the wife. It is held in quite a number of cases that the wife is not estopped to claim homestead in lands conveyed to her without consideration by the husband upon the deed being set aside by his creditors when she did not participate in the fraud. *Ruohs v. Hooke*, 3 Lea, 302; *Powell v. Warren*, 2 Shannon, 144; *Howell v. Thompson*, 11 Pickle, 396, 401.

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And it is equally true that if the conveyance of the property be fraudulent in intent on the part of the husband and wife it will not defeat the homestead right of either, but only operate as against the remainder or reversionary interest of the husband. The homestead is a constitutional exemption, and can only be alienated by the joint conveyance of the husband and wife. Constitution, Art. XI, Sec. 2.

It cannot be taken for the husband's debts against the wish of either the husband or wife. *Gray v. Baird*, 4 Lea, 215; Shannon, § 3798.

It may, it is true, be abandoned, as in case of removal from the State and becoming a resident of another State. *Farris v. Sipes*, 15 Pickle, 298.

And if the husband and wife join in a fraudulent conveyance to a third party, she may lose the exemption by virtue of the principle of estoppel. *Cowan, McCullung & Co. v. Johnston*; 2 Shannon, 41.

It is true that in *Nichols v. Davidson County*, 8 Lea, 389, it was held that the husband's fraudulent conveyance to the wife of the homestead would defeat the claim of the wife. But this was a homestead under the Act of 1868, by which the wife had no interest in the homestead, and the husband alone could convey it. Fraud cannot be predicated of a conveyance of exempt property, so as to have the effect to let in creditors to seize it for their debts against the husband. The owner of it may dispose of it by sale or mortgage at his discretion.

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Cor v. Ballentine, 1 Bax., 363; *Cronan v. Honor*, 10 Heis., 533; *Mynatt v. Magill*, 3 Lea, 72.

It does not matter, therefore, if the conveyance from the husband to the wife be fraudulent in fact, nor that both participated in the fraudulent intent, or that the conveyance was merely voluntary, it cannot deprive either of the homestead exemption.

The Court of Chancery Appeals was correct in holding that when the wife has not joined in a conveyance to a third party she is not divested of the homestead, and the mere acceptance, though she may know of its fraudulent purpose, of a voluntary conveyance by her husband when he is indebted, does not debar her from claiming the homestead; and it might, and in this case should, have gone further, and held that, though the purpose of the husband and wife may have been fraudulent, still the creditors could not reach the homestead exemption as the result of such conveyance. *Howell v. Thompson*, 11 Pickle, 401.

The remainder or reversionary interest may in such case be reached—that is, the land may be sold subject to the homestead exemption for the debts of the husband, and this is what the Court of Chancery Appeals directed and decreed.

The costs of this cause subsequent to the decree of sale, and including that decree and the costs of the appeal, are properly taxable to complainant, as he was in error from that time forward. The other costs are properly adjudicated by the Court of Chan-

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cery Appeals — that is, the defendant Lane will be taxed with the costs accrued up to the entry of the decree, and the costs hereafter to accrue will be taxed by the Chancellor as he may see fit.

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VIRGINIA IRON, ETC., COMPANY v. HAMILTON.

(*Knoxville*. November 2, 1901.)

1. RAILROADS. *Manufacturing company using engines and cars is not, when.*

The fact that a manufacturing company operates engines and cars over tramways in delivering material at its plant does not convert it into a commercial railway company, in such sense that the department rule of the fellow-servant doctrine will apply to its employees. (*Post*, pp. 706-710.)

Case cited: *Coal Mining Co. v. Davis*, 90 Tenn., 719.

2. MASTER AND SERVANT. *Master's duty to provide for servant's safety.*

The master must provide reasonably safe place and appliances for his servant while at work. The master's negligence, in this particular, which contributes proximately to the servant's injury, is actionable, although the negligence of a fellow-servant may have concurred and contributed also to the injury. (*Post*, pp. 710, 711.)

Case cited: *Iron Co. v. Pace*, 101 Tenn., 484.

3. SAME. *Same. Case in judgment.*

The plaintiff, a manufacturing company, put defendant, its employe, at work under an elevated railway track, upon and over which other of its employes were operating engine and cars, delivering material for operation of its plant. By the negligence of defendant's fellow-servants, operating the engine and cars, a stone fell from one of the cars upon defendant's head, inflicting the injury sued for. The plaintiff had negligently failed to afford any protection of the place where de-

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fendant was put to work from stones falling from cars above.

Held: Defendant is liable upon these facts. (*Post*, pp. 706-711.)

FROM WASHINGTON.

Appeal in error from the Circuit Court of Washington County. H. T. CAMPBELL, J.

CURTIN & HAYNES, KIRKPATRICK, WILLIAMS & BOWMAN, for Virginia Iron, etc., Co.

A. R. JOHNSON and BURROW BROS., for Hamilton.

McALISTER, J. Plaintiff brought this action to recover damages for personal injuries. On the trial below, at the conclusion of plaintiff's testimony, the defendant interposed a demurrer to the evidence, which was overruled by the Court, and the plaintiff's damages assessed by a jury at \$600. Defendant company appealed and has assigned errors.

The declaration alleged that defendant company is engaged in operating a furnace at Johnson City, and plaintiff (Hamilton) was engaged as a section hand about said furnace, under one Craig, in keeping the railway tracks in repair; that, on the day of the accident, Craig ordered the plaintiff out of the section work department to work near the mouth of an ore crusher, to shovel ore from the crusher by means of a common short-handled shovel; that this

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was the first time that the plaintiff worked at the crusher; that he was not skilled in any department of the company's work at the furnace, was illiterate, and ignorant of the machinery and of the danger of its operation, and was controlled by the orders of the defendant company. It is then alleged that defendant company did not provide and furnish a safe place for plaintiff to work in; that he was placed at work under an elevated railway track, about sixteen feet above plaintiff, where he was in the range of objects falling from the track or cars on it, which was dangerous to plaintiff and known to defendant company, but unknown to plaintiff. It is then alleged that while an engine was being operated on the elevated track, moving a car, there was caused to fall from said car or track a piece of ore, which struck and injured plaintiff. It is alleged that the train was taken on the elevated track without plaintiff's knowledge and without any warning whatever; that plaintiff could not hear any noise from the car above or from any person in charge thereof, if any was made, because of the great noise of the ore crusher, and that plaintiff was in a stooping position at the time of the injury owing to the nature of his work and the character of his tool. It is further alleged that plaintiff did not know he was working in a dangerous place; that he had never worked there before, and had been at work there only about forty-five minutes before he was injured; "that defendant's conduct in

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handling said ore above him, or in moving it in whatever manner it was, without means to prevent its falling down and upon him, and without warning plaintiff of the danger, was the cause of the injury," etc.

This is a substantial statement of the cause of action as outlined in the declaration. The plaintiff testified, viz.: "I was called from the track to the stockhouse, and went there and fed the rock and ore crusher about three-quarters of an hour. Other hands helped while I was feeding it. We were then ordered by our boss down to the bottom floor at the mouth of the crusher, and began shoveling away the crushed ore from the crusher. I was beneath the elevated track at the crusher. The ore had been dumped through the car and fed into the crusher, and I had gone below to take the crushed ore from the crusher. It was while shoveling ore from the crusher that I was injured by the falling of a lump of ore, weighing five or six pounds, from the car on the elevated track above."

Another witness described the accident as follows, to wit: "The train came up with a car of iron ore on the trestle, and they began to unload the ore; when it was partly unloaded they told witness and plaintiff to go down to the stockhouse floor and shovel back rock from the crusher. The crusher was not then running. While we were shoveling down there the train backed up and the engine went off somewhere to do some other work. The engine

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after awhile came back (that is, after the car of ore had been unloaded), and rolled on over our heads and struck the car to couple up to it, and I then looked up and saw a rock roll from somewhere about the car. It fell on the running board, and rolled off and hit plaintiff on the head.”

The proof tends to show that this piece of ore fell off the brake-beam, where it had probably lodged when the ore was being dumped from the car into the crusher. The proof also tends to show that the defendant company had instructed the workmen to be careful and not leave any rock on the trestle, so that they would fall on the men below. But the piece of ore in question had, in some way, become lodged on the brake-beam of the car. The brake-beam was at the end of the car. The proof also tends to show that such an accident had never happened before.

With this statement of the case we proceed to notice the assignments of error. The Circuit Judge, in overruling the demurrer to the evidence, did not state the reasons for his action, but we are satisfied the Court rested the liability of the company upon the ground that it had not furnished the plaintiff a reasonably safe place to work. This is the ground of liability claimed by plaintiff in his declaration. Much of the able argument of counsel for plaintiff in error is directed towards showing that plaintiff would not be entitled to recover on the ground that a warning should have been given him that the en-

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gine was about to go upon the elevated track to couple to the empty car, since the plaintiff himself states that he had constantly, for three months, been on and about that track repairing it, and was perfectly familiar with the movements of the train. Again, counsel argue that the car was overloaded by the fellow-servants of plaintiff, and if a piece of ore was negligently left on the brake-beam the negligence was the act of a fellow-servant and plaintiff could not recover.

It was held by this Court, at Knoxville, September term, 1900, in *Nelson v. Virginia Iron, Coal & Coke Co.*, that the defendant, in this case, in operating its tram cars about its furnace yards, was not liable for the negligence of an engineer in injuring a carpenter of the company on the track, for the reason that the negligence of the engineer was that of a fellow-servant, and that the different department rule is restricted to railroad companies. The fact that an engine was used in handling cars of iron ore upon the elevated track does not convert it into a commercial railroad. *Coal Mining Co. v. Davis*, 6 Pickle, 719. It is insisted in this case that the loading and unloading of the car in question was the duty of the fellow-servants of the plaintiff. Hence, if the car was negligently unloaded, leaving a piece of ore on the brake-beam, that negligence was the act of a fellow-servant. It is insisted, however, on behalf of plaintiff, that it is the duty of the master or employer to keep his

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premises, used in the prosecution of his business, in a reasonably safe condition, and if he fails to do so, he is liable to the servant for all injuries resulting from such defects. *Iron Co. v. Pace*, 101 Tenn., 484. It is claimed that it was the duty of the company to have protected its employees, working at the crusher beneath the elevated track, against falling stone or ore, by the erection of a suitable platform or other barrier. The important inquiry, then, in this case is whether the injury to plaintiff was the result of defective premises or was it caused by the negligent use of the company's appliances by the fellow-servants of plaintiff.

While the defendant company is not liable for the negligence of the fellow-servant, yet, if the company has itself been guilty of any negligence concurring in producing the injury, there is liability. The question, whether or not the company had provided a reasonably safe place for the plaintiff to work, was submitted to the Court by the demurrer to the evidence, and his action in overruling the demurrer was a resolution of that contention against the company. In looking to the evidence on this subject, we cannot say there was no evidence which would have warranted a jury in finding that these premises were not reasonably safe.

The judgment must, therefore, be affirmed.

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HOOPER, ADMR., v. RAILROAD.

(*Knoxville*. November 2, 1901.)

1. AMENDMENT. *Relation of.*

An amendment of a declaration, in an action by an administrator for personal injuries causing the death of his intestate, striking out the name of one beneficiary and substituting the name of another and different one, relates to the commencement of the action so as to defeat the running or bar of the statute of limitations. Such amendment does not introduce a new cause of action, but merely corrects the statement of the old one. (*Post*, pp. 713-720.)

Cases cited: Railroad v. Foster, 10 Lea, 351; Railroad v. Bean, 94 Tenn., 394; Railroad v. Johnson, 97 Tenn., 670; Loague v. Railroad, 91 Tenn., 461; Whaley v. Catlett, 103 Tenn., 351.

2. RES ADJUDICATA. *What is not.*

The judgment of an appellate Court, reversing the judgment of a trial Court and remanding the case to the Court "whence it came, with directions to grant a new trial, to sustain the plea of the statute of limitations made to the amended declaration, and to enter judgment for defendant," is not such final adjudication as will debar the plaintiff from taking a non-suit in the trial Court and thereafter prosecuting a new suit brought within a year after such dismissal. (*Post*, pp. 720-723.)

Case cited: Railroad v. Brigham, 95 Tenn., 624.

FROM KNOX.

Appeal in error from Circuit Court of Knox County. JOSEPH W. SNEED, J.

Hooper, Admr., v. Railroad.

W. E. DRUMMOND, PICKLE & TURNER, MYNATT & FOWLER, for Hooper.

SMITH & HAMMOND, and FRANTZ & WRIGHT, for Railroad.

MCALISTER, J. This is a suit to recover damages for personal injuries. Plaintiff's intestate, J. W. Lebow, on January 15, 1897, was run over and killed by one of defendant's trains. The suit of the administrator was originally brought July 8, 1897, in the Circuit Court of Knox County, to recover \$20,000 damages. The declaration was filed November 15, 1897, alleging that complainant, as administrator, brought the suit for the benefit of Mariah Lebow, the mother of deceased, as his next of kin and distributee. Thereupon the defendant company, on the same day, removed the cause, on the ground of nonresidence, to the Circuit Court of the United States, at Knoxville, and February 26, 1898, pleaded to the declaration "not guilty." On March 24, 1898, the plaintiff was permitted by the Court to amend his declaration, so as to strike out the name of Mariah Lebow, the mother, and insert that of James Madison Lebow, the father of the deceased, as his next of kin and sole distributee. The defendant company then interposed a plea of the statute of limitations of one year to the amended declaration, which plea was, on motion of plaintiff, stricken out by the Court, upon the ground that the amendment related back to the commencement

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of the action. The cause was then tried before the Court and a jury, resulting in a verdict and judgment for the plaintiff. The cause was then removed by writ of error to the United States Circuit Court of Appeals, at Cincinnati, and on May 1, 1899, that Court reversed the judgment of the United States Circuit Court and remanded the cause to the Court "whence it came, with directions to grant a new trial, to sustain the plea of the statute of limitations made to the amended declaration, and to enter judgment for defendant." The action of the Court was based upon the ground "that the Tennessee Act of 1883, Ch. 186, created a new cause of action in the next of kin of deceased; that the next of kin for whose benefit the suit is brought is the real plaintiff, and the administrator is a mere trustee and nominal party, and hence an amendment changing the name of the beneficiary was in effect a new suit, and could not relate to the original summons and so escape the effect of the plea of the statute of limitations." This case is reported in 92 Fed. Rep., 520. On the remand of the case to the United States Circuit Court, the former judgment was set aside and a new trial granted. It appears that at this stage of the case and before a new trial was had, to wit: October 10, 1899, the plaintiff took a voluntary nonsuit and the cause was dismissed. From this judgment the defendant company on January 20, 1900, prosecuted a writ of error to the

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United States Circuit Court of Appeals at Cincinnati, insisting that under the former mandate of reversal the Circuit Court should have entered a final judgment in favor of defendant company, but the Circuit Court of Appeals, on February 2, 1901, affirmed the judgment of the Circuit Court. See *A., K. & N. R. R. Co. v. Hooper*, 105 Fed. Rep., 550. In the meantime, after the nonsuit and dismissal of the case in the United States Circuit Court, and before the suing out of the last writ of error to the United States Circuit Court of Appeals, the plaintiff, on October 20, 1899, brought a new suit for \$2,000 damages in the Circuit Court of Knox County. The defendant pleaded not guilty and the statute of limitations of one year. To this plea of the statute of limitations the plaintiff replied by the bringing of the former suit, as above recited, within the time limited, the nonsuit and dismissal without prejudice, and that this new suit was brought within one year after the termination of the first suit, under Shannon's Code, § 4446. To this replication the defendant company, on February 10, 1900, demurred on several grounds, and particularly because the removal of the original suit to the Federal Court had removed not only that suit, but the cause of action; that the State Court was thereby deprived of all jurisdiction over the subject-matter of the suit, and the new suit could not be maintained in the State Court. The Circuit Judge, on March 10, 1900, sustained this demurrer, on the ground stated,

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and dismissed the plaintiff's suit. On appeal to this Court, that judgment was, on October 6, 1900, reversed and cause remanded.

It was held by this Court that when an action, commenced in due time in the State Court, is removed to the Federal Court, and there disposed of by voluntary nonsuit, the plaintiff may, under § 4446 Shannon's Code, within one year thereafter bring and maintain a new suit on the same cause of action in the State Court, although the latter action would have been barred but for the saving of the statute. *Hooper v. A., K. & N. Ry. Co.*, 22 Pickle.

On the remand of the case to the Circuit Court of Knox County, the defendant company, on March 4, 1901, filed a rejoinder to the plaintiff's replication to defendant's plea of the statute of limitations. Then followed a demurrer, by plaintiff, to the rejoinder, which was overruled by the Court. Plaintiff then filed a sur-rejoinder, to which defendant demurred. The substance of this voluminous pleading was, first, that plaintiff's action was barred by the statute of limitations of one year, and, second, that the fact had been finally adjudicated by the United States Circuit Court, at Cincinnati, in the suit therein pending between these parties for the same cause of action.

The Circuit Court of Knox County overruled the demurrer herein so far as it averred former adjudication, but sustained said demurrer to the extent of

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holding that the present suit is barred by the statute of limitations of one year and dismissing said suit. Plaintiff appealed and assigns as error the action of the Circuit Court adjudging that plaintiff's suit is barred. The original suit herein was brought by the administrator of James Lebow, and in the original declaration Mariah Lebow, the mother of deceased, was named as beneficiary. The designation of Mariah Lebow, the mother of deceased, as next of kin and beneficiary of the suit, was erroneous, since James M. Lebow, the father of deceased, survived him. Accordingly, after the removal of the cause to the United States Circuit Court, leave was obtained to amend the declaration so as to strike out the name of Mariah Lebow as beneficiary and substitute the name of James M. Lebow, the father of deceased, as next of kin and sole beneficiary. This amendment and substitution was made more than twelve months after the commencement of the original action. The question now presented for our determination is, whether this amendment introduced a new cause of action or did it relate back to the original summons? If it introduced a new cause of action the suit is plainly barred, but otherwise, it is not barred. The Circuit Court, in adjudging the action barred, seems to have predicated his opinion upon the holding of the United States Circuit Court of Appeals when the cause was before that Court.

The United States Court, in considering this

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question, said, in part, viz.: "The sole question presented upon this record is whether, when an administrator, under the present Code of Tennessee, brings his suit to recover damages for the wrongful death of his intestate, and avers in his petition that he brings the suit for the benefit of one person, as the intestate's next of kin, and afterwards substitutes in his declaration for that person the name of another as next of kin, this is a change of the cause of action such as that the statute of limitations runs to the date of the amendment. . . .

To change the beneficiary under the statute changes the suit, the amount of the recovery, and states a new and different cause of action. In the light of this conclusion, the plea of the statute was good against the amendment herein when filed, and should have been sustained." *Atlanta, Knoxville & Northern Ry. Co. v. Hooper*, 92 Fed. Rep., 820.

Since this case was decided this Court has had occasion to consider this question, and a contrary opinion was reached. In *Whaley v. Catlett*, 103 Tenn., 351, it was said, viz.: "We are of opinion that a careful reading of the statutes can lead to no other conclusion than that they provide alone for the continued existence and passing of the right of action of the deceased, and not for any new, independent cause of action in his widow, children, or next of kin. Section 4025, Shannon's Code, refers to it as the right of action which deceased should have had in case death had not ensued, and pro-

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vides that it shall not abate or be extinguished, but shall pass to his widow, etc. It does not provide for nor refer to any new cause of action arising or coming into existence in their favor. It is alone by these statutes that a right of action exists in the widow, children, or next of kin at all, for the unlawful killing of the deceased, and this right exists under the statute, not because it arises directly to them in their own right, but because it passes to them in right of the deceased. It was also held in this case that the Act of 1883, Ch. 186, enlarging the scope of damages recoverable in actions brought under existing statutes by the widow, children, or next of kin or personal representative of a decedent for his personal injuries, does not create any new or independent cause of action, but merely regulates the damages recoverable under an existing cause of action," citing *Railroad v. Bean*, 10 Pickle, 394; *Railroad v. Johnson*, 13 Pickle, 670; *Loague v. Railroad*, 7 Pickle, 461.

We hold, therefore, under the rulings of this Court that the amendment in question did not introduce a new cause of action, but merely substituted the name of the true statutory beneficiary for the name inadvertently used. It is still the same cause of action—that of deceased—and the designation of the beneficiary relates back to the original summons. *Railroad v. Foster*, 10 Lea, 351.

The beneficiary is not a party to the action, but is simply designated as the person entitled to the

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recovery. The administrator is the party entitled to prosecute the action, but for the benefit of the next of kin. If there is no beneficiary, or next of kin, the administrator is not entitled to prosecute a suit. The Circuit Court was, therefore, in error in sustaining this ground of demurrer.

It is insisted, however, on behalf of the company that the adjudication of this question by the United States Circuit Court of Appeals, in a suit between the present parties, was final and conclusive. As already stated, the United States Circuit Court of Appeals in the suit between these parties held the plea of the statute of limitations good, and remanded the cause with directions to the lower Court to grant a new trial, to sustain the plea of the statute of limitations to the declaration as amended, and to enter judgment for defendant company. On the remand, and prior to a new trial, plaintiff took a voluntary nonsuit. Defendant appealed to the Circuit Court of Appeals, insisting it was entitled to a judgment on its plea of the statute of limitations, and that the Court below was in error in permitting a nonsuit. On this subject, that Court, interpreting its own judgment, held as follows: "The contention of the plaintiff in error is that the Circuit Court should have ordered that the defendant's plea of the statute of limitations be sustained, and entered judgment for the defendant in strict conformity with the directions of the mandate. The ground of complaint is that, whereas the judgment

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directed by the Court would have terminated litigation by settling the rights of the parties, the judgment actually entered leaves the plaintiff at liberty to prosecute a new action for the same cause. But, we think, the course taken by the Circuit Court was entirely proper. The directions of the mandate, when rightly construed, intended to award the privilege to the plaintiff of having a new trial, if he should desire it, and did not make it compulsory. If the plaintiff should elect to take a new trial, then the further directions of the mandate would govern the Court in its further proceedings thereon. Such provisional directions are not unusual in appellate courts, the object being to guide the Court below in such further proceedings as may be taken and not to subvert the normal course of procedure. Under the statute of Tennessee (Code § 4246) the plaintiff may, at any time before the jury retires, take a nonsuit or dismiss his action as to any one or more defendants; but if the defendant has pleaded a setoff or counter claim, he may elect to proceed on such counter claim in the capacity of plaintiff." And, at the common law, the plaintiff may take a nonsuit before the trial begins, and in some jurisdictions at any time before the verdict, and the right to the same whether upon the first trial or upon a new trial after judgment has been ordered set aside and "held for naught" and such new trial ordered. 6 Enc. Plead. & Prac., 836, 838, 839, and cases cited.

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“In the case of *Gardner v. Railroad*, 105 U. S., 349 (S. C., 14 Sup. Ct., 14; 37 L. Ed., 1107), the plaintiff had brought suit in the State Court for a personal injury and had recovered a judgment. The defendant removed the case to the Supreme Court, and that Court, upon consideration of the evidence, held that the plaintiff had not made out a cause of action, and for that reason the judgment of the lower Court was reversed and a new trial granted. After the case had been remanded, the Court below entered an order setting aside its former judgment, and ordering a new trial. Thereupon the plaintiff voluntarily submitted to a nonsuit, and judgment was entered accordingly.

“The plaintiff having commenced a new suit in the Federal Court, one of the questions was, whether he was barred by the determination of the facts and the judgment of the State Supreme Court in the former action. After judgment the case went to the Supreme Court of the United States, where it was held that, by the reversal of the judgment of the lower Court by the State Supreme Court, the matter was set at large, and that, although the lower Court had actually ordered a new trial as directed by the Supreme Court, the plaintiff was at liberty to disclaim the right to pursue it, and to become nonsuit, and thereupon to commence a new suit in any Court having jurisdiction. In the present case this Court did not assume the power of arbitrarily compelling the plaintiff to go on with his

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suit after his judgment had been reversed, but simply directed what judgment should be entered in case he elected to go to a final determination in the Court below. This is the reasonable construction of the mandate. The judgment of the Circuit Court is affirmed with costs.”

The judgment of the Circuit Court of Appeals was not a final judgment, and, therefore, could not support a plea of former adjudication. *Railroad v. Birmingham*, 11 Pickle, 624.

But for the error of the Circuit Court, in holding plaintiff's action barred by the statute of limitations, the judgment is reversed and the cause remanded.

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KNOX COUNTY v. FOX.

(*Knoxville.* November 4, 1901.)

1. **SHERIFF.** *Allowed jail fees for detention of workhouse prisoners when.*

The county is liable to the Sheriff for board and turnkey fees of prisoners sentenced to the workhouse, but committed to jail, under mittimus, pending their removal to the workhouse.

Code construed: §§ 6352, 7370-7376, 7420 (S.); §§ 5269, 6237-6243 (M. & V.); §§ 4517, 5395-5401 (T. & S.).

2. **WORKHOUSE.** *Convicts not liable to work out costs and fees accruing after conviction.*

Workhouse convicts cannot be compelled to work out costs or jail fees that accrue after their conviction—*e. g.*, Sheriff's fees for board and turnkeys accruing by reason of their detention in jail on their way to the workhouse.

Cases cited: *Knox v. State*, 9 Bax., 202; *Ex parte Griffin*, 88 Tenn., 547.

FROM KNOX.

Appeal in error from Circuit Court of Knox County. JOSEPH W. SNEED, J.

J. R. AILOR and PICKLE & TURNER, for Knox County.

CHARLES T. CATES, JR., for Fox.

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McALISTER, J. The object of this suit is to recover certain jail fees alleged to be due Fox in his capacity as Sheriff and Jailor of Knox County. The case originated before a Magistrate, who pronounced judgment in favor of the Sheriff for the amount of his account. On appeal this judgment was affirmed by the Circuit Court. The case was heard in the Circuit Court on a stipulation of agreed facts, embodying, substantially, the following proof: The Sheriff sues the County to recover the cost of boarding various prisoners during the month of May, 1901, legally sentenced or committed to the workhouse of Knox County by different Justices of the Peace of said county, and also the turnkey's fees incident to receiving said prisoners into the jail of Knox County and delivering them at said jail to the proper workhouse officials. The jail of Knox County is situated in the city of Knoxville, but the workhouse of the county is located twelve or thirteen miles from said city. The workhouse authorities have, for many years, under contract with the Sheriff, been in the habit of sending, at intervals, to the jail of Knox County for workhouse prisoners convicted and sentenced to the workhouse by the Justices of the Peace in the city of Knoxville. The charges sought to be collected by the Sheriff for the board of prisoners cover their confinement in the county jail between the time of their conviction and the time when the authorities of the workhouse sent to the jail and received them from

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the Sheriff. The Knox County workhouse is under the control and supervision of commissioners, with an appointed manager or superintendent. It is entirely separate from the Knox County jail. J. W. Fox, plaintiff in this cause, was duly notified by G. L. Maloney, County Judge, before May 1, 1901, that after April 30, 1901, said fees for turnkeys and boarding prisoners would be disallowed because not warranted by law. The plaintiff presented an itemized statement of his account for May, 1901, showing names of prisoners and offenses for which each was sentenced to the workhouse, the name of the Justice trying the cause, the date when each prisoner was received at the jail, and the date of his delivery to the workhouse officials, the number of days charged for each prisoner and amount, the number of turnkeys charged against each prisoner, and the amount of charge against each prisoner. The County Judge disallowed the account and thereupon this suit was brought against the county.

It should have been stated that the charges made by the Sheriff for turnkeys and board of prisoners were added by him to the costs taxed by the Magistrate against the prisoners, and that said amounts have been worked out by each prisoner at the county workhouse in the same manner as his fine and other costs were worked out.

It is insisted on behalf of the county that these charges were not warranted by law. Counsel cited Shannon's Code, § 6352, viz.: "No officer is allowed

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to demand or receive fees, or other compensation, for any service further than is expressly provided by law," and that no provision has been made in the statute for compensation for such services. It is claimed on behalf of the county that prisoners sentenced by magistrates to the county workhouse must be delivered at once to the Superintendent of the Workhouse and transferred to that institution, and that there is no authority whatever for their detention at the jail.

Section 7420 of Shannon's Code provides that a certified statement of the sentence of each prisoner shall be made out on printed blanks provided for that purpose, and delivered to the Superintendent of the Workhouse, and also to the County Judge, by the clerk of the Court, or the Justice of the Peace trying the same, showing specifically the name of the convict, the date of sentence, the cause for which committed, the term of imprisonment, amount of fine, costs, etc.

It is agreed in the present case that, after conviction and sentence in each of the cases herein, a mittimus was made out by the Justice of the Peace trying the particular case, directed to the keeper or Superintendent of the Workhouse. At the same time another mittimus was issued, directed to the Sheriff of Knox County, requiring him to receive and detain the prisoner in the jail of said county, unless the proper authorities of the workhouse should furnish means of transporting the prisoner to said

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workhouse, when he was required to deliver the prisoner to said authorities along with the accompanying mittimus directed to the Keeper of the Workhouse. Now, it appears that the Sheriff received these prisoners at the jail, by authority of the mittimus directed to him by the Justice of the Peace. It is the duty of the Sheriff, as the custodian of the jail, to receive all prisoners committed by authority of law. Shannon's Code, §§ 7370-6. While it is the duty of the Superintendent of the Workhouse to take charge of all prisoners committed to him, at the earliest time practicable, if he fails to do so there is no reason why the Sheriff may not receive them under a mittimus directed to him. It is not the duty of the magistrate committing a prisoner to take him or deputize a constable to take him to the county workhouse. Unless the Superintendent of the Workhouse is ready to take the prisoner, or has made provision for some other officer to receive him, the magistrate has no other alternative but to commit the prisoner to jail, there to remain until such time as the workhouse authorities have him transferred to their institution. If these prisoners are unnecessarily detained at the county jail, it is the fault of the workhouse authorities in not having them promptly transferred. It is not the duty of the Sheriff or Jailor to transfer them. The efforts of the County Judge to save the county any unnecessary expense in this matter are highly commendable, but, we think, this end may

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be more effectually accomplished by causing a prompt transfer of the prisoners by the Superintendent of the Workhouse. The Sheriff cannot refuse to receive them when they are committed to the jail under a lawful mittimus, and so long as they remain in his custody he is entitled to the same costs and fees as the law allows for other prisoners.

It appears from the statement of agreed facts herein that the fees and cost of boarding these prisoners were added by the Sheriff to the bill of costs taxed by the magistrate, and have been worked out by each prisoner in the same manner as his fine and other costs are worked out in the workhouse of Knox County. It is claimed that the fact that the county has thus received the benefit of the labor of the prisoner is an additional reason why the county should pay the costs. In the case of *Knox v. State*, 9 Bax., 202, it was held that an Act was unconstitutional which undertook to impose upon the defendant the necessity of working out "all costs which may accrue, after conviction, for clothing and other necessities." All that the prisoner could be required to work out was the fine and costs of conviction. He cannot be required to work out the State and county tax on litigation. *Ex parte Griffin*, 4 Pickle, 547. Hence there was no authority in the present case for taxing jail fees and costs accruing after conviction against the prisoners and requiring them to work out such costs in the

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county workhouse. The cost of boarding prisoners and turnkey's fees are properly chargeable in these misdemeanor cases to the county and not to the prisoner. But this fact will not prevent the Sheriff from recovering in this action against the county for fees which the county is liable to pay.

Affirmed.

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MOORE v. WARD.

(*Knoxville*. November 5, 1901.)

HOMESTEAD. *Divorced wife not entitled to, when.*

A wife who has obtained a divorce, but has not claimed the homestead or obtained decree for it in the divorce proceedings, cannot subsequently, in an independent suit, assert her right to homestead against the husband or his vendee.

Code construed: § 3810 (S.); § 2946 (M. & V.); § 2121a (T. & S.).

Cases cited: *Joyce v. Tomlin*, 3 Shan. Cas., 143; *Rosenbaum v. Davis*, 106 Tenn., 51.

FROM KNOX.

Appeal from Chancery Court of Knox County.
JOSEPH W. SNEED, Ch.

LUCKY, SANFORD & FOWLER, SANSON, WELCKER
& PARKER and C. R. McILWAINE, for Moore.

CORNICK & CORNICK, for Ward.

BEARD, J. The complainant, the divorced wife of the defendant, Douglas Moore, seeks to recover as homestead a house and lot, which was his property, and sold as such under an execution levy,

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during the existence of the marital relation, and at the sale purchased by the defendant, Ward, who, upon the expiration for the time for redemption, took a Sheriff's deed to it.

The record shows that, aside from some small lots of insignificant value and encumbered by vendor's liens to their full value, the defendant did not have, at the time of the levy and sale, nor has he had since, any other real estate, and that this was and is of less value than \$1,000. It discloses further that, while this was improved property, it was not at any time occupied by complainant and her husband as a home.

Several years after the Sheriff's sale the complainant filed her bill in the Chancery Court of Knox County, within the jurisdiction of which both parties resided, praying a divorce from her husband upon the ground of the fault and misconduct of Douglas Moore, and subsequently a decree of absolute divorce was granted to her upon the ground alleged. In the pleadings in that cause there was a failure to raise the question of homestead and alimony, and the decree omitted all mention of them. The defendant, Moore, submitted to this decree, and it stands, in every respect, without modification.

After the decree for divorce was pronounced, the present bill was filed, to which her former husband and the purchaser, Ward, are made defendants, the sole purpose of which has already been indicated in the opening paragraph of this opinion. The ques-

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tion then presented is, will complainant, at this late day and in this independent proceeding, be awarded this property as against the defendant, Ward? It will be observed that this is not a controversy between Douglas Moore and his co-defendant, in which the former is asserting a right to a homestead in this property as against the latter. How, in such litigation, the rights of the respective parties might be determined, is not intimated. The only question is the one above stated.

The contention of the complainant, through her learned solicitor, is that in the case made by her divorce bill, that the statute vested a right of homestead in her, which no omission on her own part in failing to claim, or in the Court granting the divorce in failing to adjudge, can deprive her of, and this right she can as well assert now as she might have done in the original proceedings. The statute upon which this claim is made is found in the Article of the Code entitled "Homestead," and is as follows: "If the head of the family is married and his wife obtain a divorce on account of his fault or misconduct, the title to the homestead shall be vested, by the decree of the Court granting the divorce, in the wife, and after her death it shall pass to the children." Code (Shannon), § 3810.

This is not a self-executing statute creating *ex vi termini* the right of homestead in the case provided for in the divorced wife. To accomplish this end the action of the Court is required. The statutory

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right must be *vested* in her, but when and by what Court? By its express terms, by the Court granting the divorce, and in the cause in which it is granted. And there is no reason, so far as the present point is concerned, why a proceeding for divorce in a Chancery Court should not be controlled by the rule that relief cannot be granted outside of and beyond the pleadings in the cause. So that, where the complaining wife fails altogether to allege that her husband is the owner of a homestead and pray that it be set apart to her, the Court granting the divorce, if not without right, certainly is under no obligation to force it upon her by its decree.

To such case we see no reason why the rule announced in *Joyce v. Tomlin*, 3 Shannon's Cases, 143, and referred to by McAlister, J., in the late case of *Rosenbaum v. Davis*, 106 Tenn., 51, should not apply. The syllabus in that case is as follows: "Where the creditors of a husband file a bill against him, his wife, and son to set aside a conveyance made by him to them, on the ground that it was voluntary, . . . and praying for a sale to pay their debts . . . and a decree is rendered . . . ordering the land sold, which was done . . . the wife being a party to the suit was bound to have interposed her claim for homestead, and not having done so, she is precluded from asserting any right to homestead.

In *Richolt v. Mubus* (N. Dak.), 1894, reported

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in 23 L. R. A., 239, a question very similar to the one at bar was presented. It is true that there is dissimilarity in the North Dakota statute involved in that case, and the section of the Code set out above, in this, that the statute there provides that "the Court in rendering a decree for divorce *may* assign the homestead to the innocent party," etc., while the Code section is imperative that this *shall be done*. This however, it seems to us, does not deprive the holding of the Supreme Court of that State of authority in the present case. Under neither statute could the unfortunate wife be constrained to take a right which she did not claim, and under neither will the mere granting of a divorce, even on the ground of the husband's wrongdoing, *ipso facto*, destroy his right of property, or that of a third party who may, perchance, stand in his shoes, and vest it in the divorced wife. And we agree with that Court in its holding, "that where the decree in the divorce proceedings is silent upon the question, the homestead will, upon the dissolution of the marriage, remain in possession of the party holding the legal title thereto, discharged from all homestead rights or claims of the other party."

The result is that the decree of the Court of Chancery Appeals, reversing the Chancellor and dismissing complainant's bill, is affirmed.

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ERRATA.

P. 301. In second line of 8th head note read "and" for "are."

P. 542. In first line of head note read "reviewable" for "renewable."

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